Supreme Court, U.S.
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No. 03-____

IN THE

Supreme Court of the United States

FREDERICK SCHULTZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Stolen Property Act (NSPA), 18 U.S.C. § 2315, prohibits the knowing receipt or possession of "stolen" property that has crossed state or national borders. In this case, the court of appeals held that antiquities that were discovered in Egypt and then exported without government permission were "stolen" from the Egyptian government, within the meaning of the NSPA, because the Egyptian government has declared that all antiquities are the property of the state. Under the court of appeals' interpretation, these antiquities were deemed "stolen" even if they were found by private persons on privately owned land and were never in the actual possession of the Egyptian state.

The question presented is whether an object is "stolen" from a foreign government, within the meaning of the NSPA, solely because that foreign government has declared, in a cultural patrimony law, that the object is the property of the state.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frederick Schultz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction (Pet. App. 1a–38a) is reported at 333 F.3d 393. The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 39a–45a) is reported at 178 F. Supp. 2d 445.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2003. On September 17, 2003, Justice Ginsburg extended the time for filing a petition for a writ of certiorari, to and including October 23, 2003. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2315 of Title 18, United States Code, provides in pertinent part:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more ... which have crossed a State or United States boundary after having been stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken ... [s]hall be fined under this title or imprisoned not more than ten years, or both.

INTRODUCTION

Before his conviction in this case, petitioner Frederick Schultz was a prominent dealer in antiquities and the owner of a leading gallery in New York City. Petitioner had previously served as president of the National Association of Dealers in Ancient, Oriental, and Primitive Art. He now stands convicted of conspiracy to receive stolen property in violation of the National Stolen Property Act (NSPA), 18 U.S.C. § 2315, for which he has been sentenced to 33 months' imprisonment. The basis for his prosecution under the NSPA was that he allegedly conspired with another person to take newly discovered antiquities out of Egypt, in violation of *Egyptian* law, and then import them into the United States. According to the prosecution's theory and under the court of appeals' decision, these antiquities were deemed "stolen" simply because the government of Egypt has declared all antiquities to be the property of the state—even if the objects are found on private property by private individuals, and even if the Egyptian government never attempts to reduce to possession or even to find such objects.

The court of appeals' decision will have enormous implications for the trade in, and circulation of, art throughout the world. Under that ruling, a museum, an art dealer, or even a tourist may be subject to criminal penalties for buying, selling, or merely *possessing* cultural objects that are deemed "stolen" solely because a foreign government has declared in

a "cultural patrimony" law that the artifacts in question belong to the state, even though such laws are far removed from the American understanding of property ownership. Nor is the holding below limited to Egyptian antiquities; it covers an enormous swath of cultural objects (including paintings, rare books, and ethnographic objects) that foreign states try to keep within their borders through their cultural patrimony laws. In addition, those who bought such cultural objects, even in good faith, may now be subjected to replevin actions brought by the countries that claim ownership of the objects through such laws. If left unreviewed, the decision of the Second Circuit—covering New York, the undisputed center of the art trade in this country—will, for all practical purposes, constitute the final word on the subject and will cast a shadow of uncertainty over the circulation of art in the United States and, indeed, throughout the world.

STATEMENT

1. The indictment in this case charged that petitioner entered into a conspiracy to violate the NSPA when he allegedly agreed to receive antiquities that were newly discovered in Egypt, with a view to selling them to collectors or museums. Indictment ¶¶ 7-8, Pet. C.A. App. A27-A34.[1] The government did not attempt to prove that the agreement involved antiquities that were "stolen" in any conventional sense. Rather, the prosecution's theory was that, because the Egyptian government has declared all antiquities discovered in Egypt to be the property of the state—no matter where or by whom such objects are found, or whether they

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[1] Petitioner's conviction was for conspiracy in violation of the general federal conspiracy statute, 18 U.S.C. § 371. The indictment charged that the object of the conspiracy was the receipt of stolen property, in violation of the NSPA. *See* Indictment ¶ 6, Pet. C.A. App. A26-A27. Thus, in the language of § 371, the indictment charged that the object of the conspiracy was "to commit an[] offense against the United States." If the underlying substantive statute, the NSPA, does not cover petitioner's actions, then his conviction for conspiracy necessarily cannot stand, for the object of his agreement was not an "offense against the United States."

are ever in the possession of the Egyptian authorities—the objects that petitioner agreed to receive were "stolen" from the Egyptian government. The prosecution's argument rested on a 1983 Egyptian statute, known as Law 117, which states that "[a]ll antiquities are considered to be public property," that "[i]t is impermissible to own, possess, or dispose of antiquities," and that, with the exception of antiquities that had been found in or before 1983 and "whose ownership or possession was already established [in 1983]," "the possession of antiquities shall be prohibited." *See* Pet. App. 8a-9a.

The government's case against petitioner turned largely on the activities of a British subject who went by the name (among other names) of Jonathan Tokeley-Parry. Tokeley-Parry, who testified for the government at trial, was a talented smuggler and restorer. He had developed elaborate arrangements with private individuals in Egypt, including farmers and builders, to find antiquities buried in the ground and to remove them from Egypt without attracting the attention of Egyptian authorities.

Tokeley-Parry and petitioner met by chance in Great Britain in 1991, and sometime later Tokeley-Parry offered to sell antiquities to petitioner. One such artifact was a head of King Amenhotep III, the ruler of Egypt from 1390–1352 B.C. According to Tokeley-Parry, he bought the head from an Egyptian farmer in 1991 for $7,000, with the assistance of an Egyptian middleman named Ali Farag. To smuggle the head out of Egypt, Tokeley-Parry coated it with plastic and disguised it to look like a cheap tourist copy purchased at a street bazaar, a standard technique that he and Ali Farag had previously used. Once the object was in England, Tokeley-Parry dipped it in acetone to remove the plastic coating and then restored it by building up the chin and filling in gouges. According to Tokeley-Parry's testimony, all of this

occurred before Tokeley-Parry met petitioner. *See* Pet. C.A. App. A109-A120, A199-A200.[2]

Because Tokeley-Parry was exporting antiquities from Egypt in violation of Egyptian law, he was worried about being arrested in Egypt and subjected to civil suits by the Egyptian government. To disguise the fact that the head of Amenhotep III and similar objects had been recently exported from Egypt, Tokeley-Parry created a fictitious provenance for the objects. Tokeley-Parry testified that petitioner was aware of the fictitious provenance. Tokeley-Perry and his girlfriend created false labels designed to suggest that the objects came from an old English collection. *See* Pet. C.A. App. A120-A127.[3]

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[2] Many of the other objects that Tokeley-Parry offered petitioner were eventually revealed to be either completely fake or heavily restored. Two objects that Tokeley-Parry offered petitioner—a supposed sculpture of Meryet Amum (a daughter of Rameses II) and a faience figure they called "The Offeror"—were revealed to be largely fake. A third object, a black top vase, had minimal value even though it was in fact antique. Tokeley-Parry also attempted to sell petitioner a striding figure, which he nicknamed "George," that he claimed to have obtained from Egyptian villagers. "George" never found a buyer because of uncertainty about how much restoration work had been done to it, and petitioner returned it to Tokeley-Parry. Tokeley-Parry also offered to sell petitioner a group of limestone stelae uncovered in Egypt by building contractors, but Tokeley-Parry never managed to find the stelae. Pet. C.A. App. A135-A142, A159-A179, A193.

[3] The government did not attempt to prove that the head of Amenhotep III or any of the objects discussed at note 2, *supra*, was ever in the actual possession of the Egyptian government. Tokeley-Parry also testified that, in June 1992, corrupt Egyptian authorities allowed him and Ali Farag to choose objects from a "bran tub" (or crate) containing antiquities in the authorities' possession. Tokeley-Parry testified that he chose three objects from that crate, sent them to petitioner, and "explained to [petitioner] about the [bran] tub." Pet. C.A. App. A144-A149. The record does not permit a conclusion that the jury based its guilty verdict on petitioner's receipt of those three objects, rather than his receipt of other objects that were never in the actual possession of the Egyptian government. The charge to the jury did not require it to distinguish among the objects, and the jury returned only a general verdict of guilty. Thus, if this Court rejects the government's legal theory that the NSPA reaches

2. Petitioner moved to dismiss the indictment, contending that the NSPA's prohibition against receipt of "stolen" property should not be extended to reach objects that were never in the actual possession of a foreign state, but have simply been declared to be the property of the foreign state by governmental fiat. Petitioner also argued that, despite its ostensible phrasing as a law vesting ownership of all antiquities (no matter when, where, or by whom found) in the Egyptian state, Law 117 is in substance not more than a prohibition against export of antiquities from Egypt and is therefore without legal effect under U.S. law. The district court disagreed, and denied the motion to dismiss. Pet. App. 39a-45a.

The court of appeals affirmed petitioner's conviction. Pet. App. 1a-38a. Like the district court, the court of appeals ruled that the NSPA reaches objects that a foreign state declares to be within its ownership but does not reduce to possession. The court of appeals agreed with the Fifth Circuit's much-criticized decision in *United States* v. *McClain*, 545 F.2d 988 (1977), which accepted the similar contention that antiquities illegally exported from Mexico after Mexico declared all such cultural property to be the property of the state were "stolen" from the government of Mexico, even if the Mexican state never possessed the objects in question. Pet. App. 14a-15a.

The court also rejected petitioner's argument that the government's theory of prosecution is inconsistent with the Convention on the Means of Prohibiting and Preventing the Illegal Import, Export and Transfer of Ownership of Cultural Property (Nov. 14, 1970), 823 U.N.T.S. 231 (1972) (UNESCO Convention), which the United States has ratified and implemented through the Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601 *et seq.* The

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objects that are simply declared to be the property of a foreign government, even if that government never attempts to reduce those objects to actual possession, petitioner's conviction cannot stand. *See Yates* v. *United States*, 354 U.S. 298, 312 (1957).

court relied on statements in the legislative history of the CPIA to the effect that that statute was not intended to preempt state and federal laws governing stolen property, including the NSPA. Thus, the court concluded, "the passage of the CPIA does not limit the NSPA's application to antiquities stolen in foreign nations." Pet. App. 24a–25a.[4]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals in this case represents a startling development in the law governing museums, art dealers, and collectors. Its significance in that field—indeed, its significance for the trade in and circulation of art throughout the world—cannot be overstated. Under the court of appeals' decision, a museum or an art dealer may be prosecuted under the NSPA for buying or selling "stolen" property where there is no invasion of any property interest, except that a foreign government has declared in a sweeping "cultural patrimony" law that whole categories of cultural objects belong to the state. A museum could also be criminally punished for *possessing* stolen property that it originally bought in complete good faith, if it later learns that a foreign state has a cultural patrimony law reaching objects in its collection. Even a casual collector or tourist could be prosecuted under the NSPA for possessing stolen property if he found or purchased an artifact from a country with a cultural patrimony law and later learned that the object was covered by such a law. That would be true even if he bought the object outside the claiming country—for example, if he bought Egyptian antiquities covered by Law 117 when he was on a trip in France, or indeed from a gallery in Manhattan.

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[4] The court of appeals also rejected petitioner's contention that he should have been allowed to present a defense based on what the court called "mistake of American law." Petitioner would have shown that he believed in good faith that bringing Egyptian antiquities into the United States did not violate U.S. law, and that he had previously given a speech stating that the U.S. legal system does not enforce other nations' blanket claims of ownership. *See* Pet. C.A. App. A302; Pet. App. 28a-31a.

The court of appeals' decision effects an avulsive change in the law under the NSPA. It is inconsistent with fundamental conceptions of property ownership in our legal system that undergird the NSPA. It also renders meaningless the carefully drawn provisions in a multilateral treaty to which United States and dozens of other nations are parties, as well as a federal statute implementing that treaty, in which Congress and the Executive Branch addressed the difficult policy questions concerning how best to preserve antiquities and cultural property from destruction. For all these reasons, the decision below warrants this Court's review.

A. The Broad Consequences Of The Decision Below Warrant This Court's Review

There can be no doubt that the court of appeals' ruling is of enormous significance—most directly to all who are involved in the importation, sale, and collection of art in this country, but also to all who benefit from the circulation of art throughout the world, even as occasional visitors to museums. Under the decision below, museums, dealers, collectors, and tourists may be criminally punished for purchasing, selling, or merely possessing artifacts brought here from another country if the government of that country has declared those artifacts to be the property of the state. Nor is the decision limited to Egyptian antiquities: laws enacted by dozens of countries purport to establish state ownership of all manner of art works and cultural property, including paintings, rare books, and postage stamps. Some of these laws go so far as to assert state ownership of art works that were not even created in the territory of the claiming state, but were created elsewhere and subsequently brought there.[5]

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[5] *See* UNESCO Convention art. 1, 823 U.N.T.S. at 234-235 (broad definition of "cultural property" that may be regulated and protected by signatory states, including "[r]are collections and specimens of fauna, flora, minerals and anatomy" and "postage, revenue and similar stamps"); *see also* John Henry Merryman & Albert E. Elsen, *Law, Ethics and the*

The government's theory of prosecution in this case is sure to cast a shadow of uncertainty over the trade in art and antiquities. The reality of the art market is that provenances are often lost to history, and it can be prohibitively difficult to establish with certainty when an artifact was in fact taken out of a foreign country that claims ownership of all objects in a broad category such as antiquities. *See* Paul M. Bator, *An Essay on the International Trade in Art*, 34 Stan. L. Rev. 275, 345 (1982); *see also* John E. Conklin, *Art Crime* 77 (1994). This uncertainty places museums, dealers, and collectors at great peril: under the decision below, at any moment they may find that they are in possession of "stolen" art, even though they acted in good faith in buying an object.

These broad consequences of the court of appeals' ruling warrant this Court's review. We acknowledge that no court of appeals has ruled directly contrary to the courts below on the question presented. As a practical matter, however, in the absence of this Court's review, a ruling by the Second Circuit on an important question of federal law relating to the international trade in art is likely to be the final word. New York City remains the center of the art market in this country, and no serious sellers or purchasers of fine art or antiquities in this country can disregard the law that is applicable in that jurisdiction.[6]

In particular, the consequences of the decision below for important institutions such as museums warrant review by

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Visual Arts 69-71 (3d ed. 1998); John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. Davis L. Rev. 477, 477-479 (1988).

[6] *See* Ashton Hawkins et al., *A Tale of Two Innocents: Creating An Equitable Balance Between The Rights Of Former Owners And Good Faith Purchasers Of Stolen Art*, 64 Fordham L. Rev. 49, 51 (1995); *see also* Patty Gerstenblith, *Picture Imperfect: Attempted Regulation Of The Art Market*, 29 Wm. & Mary L. Rev. 501, 507 (1988); Marilyn Phelan, *Scope Of Due Diligence Investigation In Obtaining Title To Valuable Artwork*, 23 Seattle U. L. Rev. 631, 639-640 (2000); Thane Peterson, *Art Collectors Get Patriotic: The Main Trend In The Market Now Is "Buy American,"* Business Week, Dec. 31, 2001, at 110 (describing New York as "the center of the world art market").

this Court. The NSPA reaches not just those who buy and sell stolen property, but also anyone who *possesses* stolen property that has previously been moved across state or national borders. 18 U.S.C. § 2315; *see United States* v. *Trupin*, 117 F.3d 678, 684 (2d Cir. 1997). Under the decision below, therefore, any museum that learns that an item in its collection of antiquities was taken out of Egypt since 1983—and simply continues to possess it—could be subject to criminal prosecution under the NSPA. Indeed, any museum that has in its collection any item over which another country claims ownership pursuant to a cultural patrimony law could be prosecuted under the NSPA for possessing stolen property.[7]

It would seem that the only way that a collector or museum could be sure to avoid criminal prosecution for possession of "stolen" cultural property would be to return every questionable object in its collection to the government of the claiming state, even if those objects were purchased decades ago and in good faith from reputable dealers. But even if

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[7] The difficulty facing museums and collectors who purchased objects in good faith, but who now may face prosecution under the NSPA for possessing stolen property, is well illustrated by the J. Paul Getty Museum's 1987 acquisition of an ancient Aphrodite figure. In 1987, the museum adopted an Antiquities Acquisition Policy, which involved sending photographs and measurements to the ministries of culture of the countries of likely origin, waiting for and dealing with responses, sending the same information to The Art Loss Register, and awaiting its response. When the museum became interested in acquiring an ancient Aphrodite figure, it notified Greek and Turkish officials, as well as the Italian government, which replied that it knew nothing about the statue and thought it was not Italian. After the museum acquired the figure, the Italian government changed position, claimed that the piece must have been smuggled out of Italy during a 1979 Sicilian excavation, and asserted Italian ownership of the piece based on an Italian patrimony law. *See* Linda F. Pinkerton, *Museums Can Do Better: Acquisitions Policies Concerning Stolen and Illegally Exported Art*, 5 Vill. Sports & Ent. L.J. 59, 67 & nn. 24, 25 (1998); Conklin, *supra*, at 194. Although the Italian government ultimately did not press its claim, the Getty could be prosecuted even today under the NSPA for continuing to possess the figure if evidence supported the Italian government's claim that the figure's export violated Italian patrimony laws.

one assumes that the many individuals and institutions who likely possess such objects could ascertain where to return them, the wisdom of such an approach for the preservation of cultural objects is highly questionable. As one commentator has observed with respect to Mexico, which, like Egypt, has declared the state to be the owner of all antiquities, "[i]t seems doubtful that even the government of Mexico would welcome back the innumerable minor ceramics which have flowed from its borders since 1972." James R. McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art Into the United States*, 85 Dick. L. Rev. 565, 590 (1981); *see also* Ronald D. Abramson & Stephen B. Huttler, *The Legal Response to the Illicit Movement of Cultural Property*, 5 J.L. Pol'y Int'l Bus. 932, 945-946 (1973).[8]

In addition, a rule that illegally exported cultural property is to be treated as "stolen" exposes museums and collectors in this country to dramatically expanded civil consequences. *See* Bator, *supra*, 34 Stan. L. Rev. at 351-354. Although the Department of Justice, exercising prosecutorial discretion, might refrain from unleashing the NSPA against the Metropolitan Museum of Art, there is no reason to conclude that foreign states will be so restrained. The decision below opens the door for countries that have enacted cultural patrimony laws to bring replevin actions against museums to recover artifacts in the museums' collections. And whereas in a criminal prosecution, a museum might be able to argue to the jury that it lacked the necessary *scienter* be-

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[8] On the other hand, a likely consequence of the decision below is that the trade in illegally exported art from countries with cultural patrimony laws will simply be diverted to other art-importing areas, such as Europe and Japan, which do not treat objects illegally exported from other countries as "stolen," and which also generally provide much greater protection to *bona fide* purchasers of objects that turn out to be stolen. *See* Merryman & Elsen, *supra*, at 84-85; Michelle I. Turner, *The Innocent Buyer of Art Looted During World War II*, 32 Vand. J. Transnat'l L. 1511, 1540 (1999) (noting that, under Swiss law, a *bona fide* purchaser obtains title even if property is stolen).

cause it was not aware that a particular object in its collection was exported from the country in question after a particular date, that approach could not assist a museum in defending against a replevin action, in which *scienter* is not an element.[9] Thus, as a recent article from the art press reports, "U.S. museums have voiced concerns in recent years that foreign governments such as Italy and Egypt might seek to 'clean out' their museum cases with claims based on foreign laws which vest ownership of antiquities in the foreign state."[10]

B. The Decision Below Is Inconsistent With Fundamental Principles Of American Law

The decision below not only has vast implications for the international trade in art; it is bad law. Under the court of appeals' decision, a U.S. court must accept uncritically the declaration of a foreign government that it owns all property of a certain nature within its borders, no matter how unrealistic—or indeed how reprehensible—such a declaration is, as long as the foreign legislation is in fact a "true ownership law" (Pet. App. 23a). This deferential stance is unmoored in common law concepts of property; it is certainly not compelled by anything in the NSPA; and it is unworkable and unfair.

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[9] Even a *bona fide* purchaser does not obtain good title to a "stolen" art object. *See Morissette* v. *United States*, 342 U.S. 246, 253-254 (1952); *Kunstsammlungen zu Weimar* v. *Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982). A handful of such replevin lawsuits have been brought in the past, but until now they have generally not been successful. *See Republic of Turkey* v. *OKS Partners*, 797 F. Supp. 64 (D. Mass. 1992); *Republic of Turkey* v. *Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990); *Peru* v. *Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd*, 933 F.2d 1013 (9th Cir. 1991) (Table); *Republic of Croatia* v. *Trustee of Marquess of Northampton 1987 Settlement*, 610 N.Y.S.2d 263 (App. Div. 1994); *Republic of Lebanon* v. *Sotheby's*, 561 N.Y.S.2d 566 (App. Div. 1990). The principle that illegally exported art works are "stolen," however, is likely to give substantial impetus to such lawsuits.

[10] Martha Lufkin, *Egypt demands return of antiquity at Virginia museum, threatening lawsuit*, at http://www.theartnewspaper.com (Aug. 2, 2002).

1. The notion that a government may simply assert ownership (without offering compensation) over all property of a certain nature within its borders, even when that property is found on private land, is entirely foreign to our legal system. The rule here has long been that owners of real property have title to movable objects found on their land. Ray Andrews Brown, *The Law of Personal Property* § 3.2, at 26 (3d ed. 1975).[11] If our government wishes to take such property for its own, then it must offer just compensation. U.S. Const. amend. V. Egypt's Law 117, however, does not require Egypt to provide compensation for any antiquities found after 1983. Rather, the government of Egypt claims blanket ownership of such objects irrespective of whether it has ever attempted to reduce the items to possession, and even if it would need the permission of the private landowner to come onto the property to do so.

One should hesitate to conclude that Congress intended a criminal statute such as the NSPA to reach such an exotic form of property "ownership," established purely through government fiat and without any requirement of actual possession, which is contrary to our own common law and public policies concerning the protection of private property. "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." *United States* v. *Bailey*, 444 U.S. 394, 415 n.11 (1980); *see Morissette* v. *United States*, 342 U.S. 246, 263 (1952). Under our common law, possession of tangible personal property is a particularly important stick in the bundle of property rights and can itself confer ownership. *See Pierson* v. *Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805); *Eads* v. *Brazelton*, 22 Ark. 499 (1861).

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[11] *See Allred* v. *Biegel*, 219 S.W.2d 665 (Mo. Ct. App. 1949) (canoe embedded in soil); *Ferguson* v. *Ray*, 77 P. 600 (Or. 1904) (gold-bearing quartz embedded in the earth); *Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562 (1886) (ancient ship embedded in clay). Although Great Britain recognized an exception to that rule for a limited category of objects known as "treasure trove," which was understood to fall within the royal prerogative, that rule never gained ground in this Republic. Brown, *supra*, § 3.3, at 28.

Thus, as Professor John Henry Merryman observed, enactments like Egypt's Law 117 are not properly understood as ownership laws. Their purpose is "to keep cultural objects within the national territory," even if the government does not make any effort to reduce those objects to possession. John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. Davis L. Rev. 477, 488 (1988). "Such laws do not protect ownership; they restrict it." *Id.*

Relying on this Court's decision in *United States* v. *Turley*, 352 U.S. 407 (1957), the court of appeals stressed that, because the term "stolen" has no settled common law meaning, the common law of property provides no assistance in delimiting the reach of the NSPA. *See* Pet. App. 26a. *Turley*, however, is far afield from this case. In *Turley*, this Court concluded that the Dyer Act, 18 U.S.C. § 2312, a provision related to the NSPA that also employs the term "stolen," is not limited to the common law offense of larceny, but rather includes other illicit deprivations of "the rights and benefits of ownership" (352 U.S. at 410), such as embezzlement. But nowhere in *Turley* did the Court suggest that the word "stolen" was intended to encompass conduct that our legal system would not recognize as a deprivation of the rights and benefits of ownership *at all*—namely, someone taking an object that he found on his own land and selling it to someone else.

A simple example illustrates that Congress surely did not intend the NSPA to give effect to every declaration of ownership by a foreign government, but rather incorporated an understanding of property rights familiar to the U.S. legal system in the term "stolen." Suppose an oppressive foreign regime orders that all property of persons of a certain class or ethnic group henceforth belongs to the state, or directs that all such property be transferred (without compensation) to others belonging to a favored class or ethnic group. History has seen many such decrees and confisca-

tions.[12] Under the court of appeals' logic, a persecuted subject of such a regime who sought to protect his own property from this kind of confiscatory decree would commit a federal crime if he brought his property into the United States for safekeeping. The result is outlandish—yet nowhere does the court of appeals explain why that result would not be compelled by its reading of the NSPA.

The NSPA was not intended to vindicate purported "property" interests that our own legal system repudiates. Our Constitution and common law reject the proposition that the government may declare by fiat that objects found on private land are the property of the state, without offering just compensation. An individual in our own society who tried to protect his property from such expropriation by shielding it from the state or selling it to another person would surely not be considered to have "stolen" his own property. At least absent clear textual direction, Congress should not be presumed to have meant the NSPA to reach situations abroad that would never be considered stealing at home.

2. The court of appeals relied heavily on the Fifth Circuit's similar decision in *United States* v. *McClain*, 545 F.2d 988 (1977). In *McClain*, the court ruled that archaeological objects exported illicitly from Mexico after 1972 were "stolen" under the NSPA because a 1972 Mexican law vested ownership of all antiquities in the state. *Id.* at 996-1003. The Fifth Circuit reached that conclusion only after a lengthy review of all Mexican legislation since 1897 that addressed pre-Columbian artifacts, and only after rejecting the U.S.

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[12] *See* Cecil Gould, *Trophies of Conquest*, *reprinted in* Merryman & Elsen, *supra*, at 15-19 (discussing Napoleon's confiscations between 1794-1796); Jeanette Greenfield, *Spoils of War*, in *Spoils of War* 34-38 (Elizabeth Simpson ed., 1997) (discussing confiscations by Assyrians, Babylonians, Romans, French, Spanish, and British); *Altman* v. *Republic of Austria*, 317 F.3d 954, 959-960 (9th Cir. 2002) (discussing Nazi confiscations and appropriations), *cert. granted*, No. 03-13 (Sept. 30, 2003); *Stroganoff-Sherbatoff* v. *Weldon*, 420 F. Supp. 18 (S.D.N.Y. 1976) (discussing Soviet confiscations).

government's argument that any antiquities unlawfully exported from Mexico since 1897 were "stolen." The crucial distinction, according to the Fifth Circuit, was that the 1972 statute was a true ownership law, whereas Mexican laws enacted in 1897, 1930, 1934, and 1970 had not gone so far and constituted only export restrictions, allowing some room for private ownership of pre-Columbian artifacts. *Id.* at 997-1000.

The *McClain* decision encountered immediate criticism, and it appears that, until this case, the government never again relied on its theory in a prosecution under the NSPA.[13] Professor Paul Bator—a tireless promoter of laws and treaties to protect antiquities from spoliation and destruction—aptly characterized supposed ownership laws like Mexico's 1972 statute as "an abstraction," and described the *McClain* ruling as "overinclusive and unduly rigid." Bator, *supra*, 34 Stan. L. Rev. at 350, 354. Professor Merryman, stressing the minuscule distinction (if any) between the "mere" export restrictions and the "true" ownership law that the Fifth Circuit found in *McClain*, concluded that, when nations assert state control over cultural property, "the declaration of state ownership may be an empty formalism, intended primarily for a foreign audience, or it may be

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[13] Even the panel that issued the *McClain* decision acknowledged that "[m]useums, directors, art dealers, and innumerable private collectors throughout this country must have been in a state of shock when they read the news if they did of the convictions of the five defendants in this case." 545 F.2d at 991. The shock in *McClain* was somewhat tempered by the fact that the court of appeals reversed the convictions, in part because the district court had failed to grasp the distinction (which we submit is elusive to the point of non-existence) between Mexico's "export control" laws and its "true" ownership law regarding antiquities. *See id.* at 997-1004. The defendants in *McClain* were tried and convicted again; the court of appeals again reversed some of the convictions but affirmed others. *See United States* v. *McClain*, 593 F.2d 658 (5th Cir.), *cert. denied*, 444 U.S. 918 (1979). After that decision, the government's theory of prosecution in *McClain* had seemingly died a quiet death. The fact that the Second Circuit, located where this country's art market is centered, has now endorsed it makes this reading of the NSPA immensely more significant.

an act of expropriation of dubious internal legality." Merryman, *Retention of Cultural Property*, *supra*, 21 U.C. Davis L. Rev. at 488.

The *McClain* theory makes the scope of a federal criminal statute turn on abstruse, and often ultimately meaningless, distinctions in *foreign* law. Both the *McClain* panel and the court of appeals in this case thought it would be a simple matter for an art dealer, a museum, or a private collector to discern whether the laws governing antiquities in a country like Egypt are mere "export controls" or are "true" ownership laws. That optimism is unjustified. Many countries do not have legal systems as transparent as that of the United States. Governing legal texts may be difficult to find.[14] Difficulties in translation are also abundant, especially when the foreign law turns on unfamiliar legal concepts.[15] Moreover,

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[14] *See* Andrew Grossman, *Towards Cooperation in Access to Foreign Primary Law*, 30 Int'l J. Legal Info. 1, 2, 9-10, 12 (2002) (even comprehensive collections and libraries of foreign law have "geographic and temporal gaps in their primary-law collections," often fail to maintain legal materials "from jurisdictions of lesser priority," and do not carry materials from "subordinate levels of government generally"; most foreign legal collections will include only current primary law and thus "[l]ibrary inventories of foreign and obsolete legal norms . . . , divided geographically, temporally and by sector and ranked by order of authority, [are] likely to be historical accidents").

[15] These difficulties were clear in the *McClain* decision itself, where Judge Wisdom struggled for pages to elucidate distinctions among five different statues passed by Mexico over 80 years. Eventually, the panel reached a conclusion different from that reached by the testifying experts on Mexican law, who had opined that Mexico had asserted true ownership in 1897. 545 F.2d at 993-994, 997. On rehearing, the panel suggested that the experts might have the opportunity at the retrial "to correct any misconstruction of which this Court may have been guilty in venturing forth in this arcane field." *United States* v. *McClain*, 551 F.2d 52, 54 (5th Cir. 1977). At the second trial, one government expert reaffirmed his position that the 1897 law was a true ownership law, "at least as interpreted by some of the few Mexican nationals qualified to express an authoritative opinion." *See United States* v. *McClain*, 593 F.2d 658, 668 (5th Cir. 1979). On appeal, the court of appeals again rejected that expert's opinion. *See id.* at 670. Judge Wisdom also encountered several problems of translation, such as whether the Spanish preposition "en" should be translated as

some laws simply cannot be pigeonholed into either the "export control" category or the "true ownership" category. Consider, for example, a French law that (a) permits cultural property to be privately owned, (b) prohibits the exportation of such cultural property without state permission, and (c) provides that any cultural property that is unlawfully exported is forfeited to and becomes the property of the state. Is this a mere export restriction or a true ownership law, since the very minute that the privately owned art work leaves the country unlawfully, it becomes state property?[16]

3. The confusion and uncertainty inherent in importing these recondite foreign legal concepts into a U.S. criminal statute will chill the international trade in art. Although, as a theoretical matter, the NSPA's *scienter* requirement

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"in" or "on." 545 F.2d at 998 n.20. After the remand, the court wrestled the meaning of the Spanish word "propriedad." 593 F.2d at 670 n.20. An *amicus curiae* in *McClain* also reported that it had attempted in vain to secure translations of the pertinent statutes. 545 F.2d at 997 n.15. None of this inspires confidence that a nonlawyer could readily determine whether a foreign regulation operates as a "mere" export restriction or as a "true" ownership law.

[16] *See* Merryman, *Retention of Cultural Property*, *supra*, 21 U.C. Davis L. Rev. at 485; *United States* v. *Pre-Columbian Arifacts*, 845 F. Supp. 544, 547 (N.D. Ill. 1993) (declining to dismiss interpleader action involving pre-Columbian artifacts allegedly exported from Guatemala in violation of Guatemalan law, which "provides that, upon illegal export, the artifacts became the property of the Republic"). A famous British case involving a similar New Zealand forfeiture statute also shows the room for confusion. The government of New Zealand sued in the British courts to recover an important Maori artifact, arguing that the object was forfeited to and became the property of the state when it was unlawfully exported from New Zealand. The Court of Appeal, per Lord Denning, agreed that the New Zealand statute provided for automatic forfeiture in such circumstances, but declined to give that rule effect in British law. The House of Lords affirmed on narrower grounds, reading the New Zealand law not to provide for automatic forfeiture. *Attorney-General of New Zealand* v. *Ortiz*, [1982] 3 All E.R. 432, *aff'd*, [1983] 1 A.C. 1. If Lord Denning—perhaps the most eminent British jurist of the 20th century—and the House of Lords could not agree on the meaning of a cultural patrimony statute *in English* from a familiar legal system, it is difficult to see how non-lawyer art dealers and collectors in this country could be certain about the meanings of statutes in Arabic, Chinese, or Khmer.

should preclude the criminal conviction of one who never learned that an object in his possession might be covered by a foreign country's cultural patrimony law, that prospect can be only cold comfort to museum administrators, art dealers, and collectors, who will be understandably concerned about prosecution. Even a person who was legitimately uncertain about the "true meaning" of a foreign country's cultural patrimony law would be unable to obtain dismissal of an indictment on that basis, and would have to defend himself before a jury. Nor is it clear how deeply such a person would have to probe if he were aware that a source country had some kind of patrimony law, but was uncertain whether it was a "mere" export restriction or a "true" ownership law.[17]

Faced with the untenable task of "speculat[ing] as to the meaning of [a] penal statute[]," *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939), museums, art dealers, and collectors will likely play it safe, and err on the side of not acquiring art. This "overdeterrence" carries very significant costs—namely, the reduced circulation of art in this country and throughout the world, and with it, diminished understanding of other societies and cultures. Indeed, because the circulation of art is highly desirable, it has long been the policy of this country to encourage the importation of art and antiquities, which are generally free from import duty, subject only to narrow exceptions.[18]

There are, to be sure, difficult questions about how best to respond to problems of spoliation and destruction of culturally sensitive property in source countries. As we explain below, Congress has wrestled with these issues, considering

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[17] Indeed, in *McClain*, the defendants were charged, tried, and convicted, only to have the court of appeals reverse some of the convictions because the Mexican laws at issue were either not true ownership laws or too ambiguous to provide clear notice to U.S. citizens. 593 F.2d at 671; 545 F.2d at 997-1003.

[18] *See* Harmonized Tariff Schedule of the United States §§ 9701-9706 (2003); Payne-Aldrich Tariff Act of 1909, ch. 6, 36 Stat. 11, 81-82; McAlee, *supra*, 85 Dick. L. Rev. at 567-568.

the legitimate interests of art professionals and collectors, and weighing whether broad patrimony laws in fact protect—or endanger—art treasures.[19] Congress has consistently rejected the notion that blanket enactments like Egypt's Law 117 should be given automatic effect in our domestic law. The court of appeals has now concluded that such cultural patrimony laws should, in essence, be given effect through our own domestic criminal law. That bold stride forward is out of step with Congress.

C. The Decision Below Is Inconsistent With The UNESCO Convention And The Cultural Property Implementation Act

The court of appeals' decision renders meaningless the cautious way in which the United States government has otherwise addressed the difficult policy questions raised by unlawful export of cultural objects from other countries. According to the court of appeals, United States law accepts the blanket assertion by any other country that culturally sensitive property within its borders is the property of the

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[19] One body of opinion, understandably moved by such horrors as the looting of the Iraqi National Museum, strongly argues that a tight lid should be placed on any illicit movement of cultural property, to discourage looting and trafficking. But another body of opinion maintains that art is part of the common heritage of all humanity; that art is best protected against destruction when it is dispersed throughout the world, not concentrated in a few vulnerable locations (such as the Iraqi National Museum); that onerous restrictions on exportation of art only encourage black markets in art-source countries where authorities can be corrupted; that the international circulation of art tears down artificial boundaries and opens up avenues of understanding; and that little is done to advance the understanding of the cultural heritage of an art-source country when that country hoards objects of lesser value or even (as is the case with Egypt) effectively requires them to be left in the ground, where they cannot be seen by anyone. *See generally* Bator, *supra*, 34 Stan. L. Rev. at 295-308; John Henry Merryman, *Thinking About the Elgin Marbles*, 83 Mich. L. Rev. 1881, 1888-1895, 1910-1921 (1985); John Henry Merryman, *Two Ways Of Thinking About Cultural Property*, 80 Am. J. Int'l L. 831, 846-847 (1986); Merryman, *Retention of Cultural Property*, *supra*, 21 U.C. Davis L. Rev. at 490-512; Abramson & Huttler, *supra*, 5 J.L. Pol'y Int'l Bus. at 935-938.

state, and therefore punishes any unauthorized removal of such cultural property to the United States as trafficking in "stolen" property. But in fact, the United States has not adopted such a deferential stance to the cultural patrimony laws of other countries. Where the Executive Branch and Congress have barred the importation of culturally sensitive property, they have done so only in highly targeted measures—in a multilateral treaty that rejected the notion that any country is obliged to give effect to umbrella cultural patrimony statutes, and in the Cultural Property Implementation Act (CPIA), which implemented that treaty in a similarly narrow and focused way. This is truly an area where Congress and the President have acted with a scalpel rather than a meat axe. *Cf. United States* v. *Sun-Diamond Growers*, 526 U.S. 398, 412 (1999).

1. The centerpiece of the United States' policy concerning the importation of cultural property is the UNESCO Convention. As we explain below, the Convention does not come anywhere close to requiring parties to prohibit the importation of art and artifacts that other parties have declared to be state property. The original draft of the Convention circulated by the UNESCO Secretariat, however, would have adopted just such an approach. That draft would have required every adherent to recognize states' "ownership" of all "cultural property found within the [their] national territory," and to prohibit the importation of any such cultural property exported without a certificate. *See* Bator, *supra*, 34 Stan. L. Rev. at 371-372.

The United States found the Secretariat draft unacceptable because of its "blank check" approach requiring every country to defer to every other country's declaration of ownership of cultural property. The State Department proposed an alternative, centered on three key measures: (1) countries would agree to prohibit the importation of cultural property stolen from museums or similar institutions; (2) countries would undertake to prevent their own governmentally controlled institutions from acquiring illegal exported cultural property; and (3) countries would work together to identify and deal with specific crisis situations where a na-

tion's cultural patrimony was in imminent peril. *See* Bator, *supra*, 34 Stan. L. Rev. at 371-373; Abramson & Huttler, *supra*, 5 J.L. Pol'y Int'l Bus. at 954-959.

The final version of the Convention reflects the U.S. government's position in the negotiations. In Article 7(a), the parties agree "[t]o take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property ... which has been illegally exported." 823 U.N.T.S. at 240. Our government understands this provision to apply only to institutions directly under federal control; it does not require the United States to control the acquisition of cultural property by other museums, much less art dealers or collectors.[20] Under Article 7(b), the only import restriction left in the treaty, the states parties undertake "to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution." *Id.* This provision does not remotely suggest that the United States would prosecute someone for importing objects dug up from privately owned land in another country. And under Article 9, any state party to the treaty whose "cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials" may call on other states parties to undertake concerted international action. Egypt has not done this, and the prosecution of petitioner does not reflect any such concerted international effort.

2. The Convention went unimplemented in this country for a decade as Congress considered how to further the goals of preventing pillage and destruction of cultural property and encouraging the international circulation of art.[21] The

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[20] *See Convention on Ownership of Cultural Property*, S. Exec. Doc. B, 92d Cong., 2d Sess. 20 (1972); S. Exec. Rep. No. 29, 92d Cong., 2d Sess. 3-4, 9 (1972).

[21] The position of both the Executive Branch and the Senate was that the Convention was not self-executing, and thus implementing domestic legislation was necessary. S. Exec. Doc. B, at VI; S. Exec. Rep. No. 29, at 9.

result of Congress's work and study, the CPIA, represents another clear rejection of the "blank check" theory in which our domestic law would simply incorporate another country's umbrella declaration of state ownership of cultural property. As the Senate Finance Committee explained:

> The Committee intends these limitations to ensure that the United States will reach an independent judgment regarding the need and scope of import controls. That is, U.S. actions need not be coextensive with the broadest declarations of ownership and historical or scientific value made by other nations. *U.S. actions in these complex matters should not be bound by the characterization of other countries* . . . .

S. Rep. No. 97-564, at 27 (1982) (emphasis added).

The CPIA reflects and implements the targeted and nuanced approach of the Convention.[22] No broad, across-the-board import restriction on cultural property purportedly owned by any other state was imposed. The CPIA also contains no criminal prohibitions. Rather, Section 308 of the CPIA (19 U.S.C. § 2607)—consistent with Article 7(b) of the Convention—bars only the importation of property that was "documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution," and was stolen from such an institution. That provision would not apply to petitioner's case, which does not involve objects in the inventory of any such institution.

Section 303 of the CPIA (19 U.S.C. § 2602), which implements Article 9 of the Convention, puts in place an elaborate mechanism under which the President may restrict the importation of certain cultural property from a particular

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[22] *See* 128 Cong. Rec. 25,346 (1982) (statement of Sen. Dole) (legislation reflected "a consensus . . . among representatives of the administration, the academic and museum communities and art dealers on the necessary parameters for U.S. efforts in this field"); Leah A. Hofkin, *The Cultural Property Act: The Art of Compromise*, 12 Col.-VLA J.L. & Arts 423, 436-437 (1988).

source country. The President may act, however, only if the source country makes a specific request to the President to do so (which Egypt has not done), and only if the President makes numerous specific determinations. Even when a foreign nation has declared all cultural property within its borders to be state property *and* has asked the President for assistance and the President has determined that that nation's cultural patrimony is in jeopardy, the President still may impose import restrictions on that nation's cultural property *only* if the community of art-importing countries acts multilaterally, and *only* after expressly taking into account the international interest in exchange of cultural property. 19 U.S.C. § 2602(a), (c). This provision is designed to ensure that if the United States bars the import of endangered cultural property, the trade in such artifacts will not simply be diverted elsewhere. [23]

3. These narrowly focused provisions of the UNESCO Convention and the CPIA cast grave doubt on the court of appeals' conclusion that Congress meant to criminally punish the importation of any cultural artifact that a foreign country has declared to belong to the state. The United States rejected such an approach in negotiating the UNESCO Convention, and Congress rejected such an approach in implementing the Convention and enacting the CPIA. Congress instead determined that, before the law of the United States should be extended to protect cultural property in foreign countries, a careful balancing should be undertaken in each case.

The court of appeals' decision renders meaningless these careful lines drawn by Congress. Under the court of

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[23] In addition, under Section 304 of the CPIA (19 U.S.C. § 2603), the President may prohibit the import of certain cultural property from a particular country if he determines that an "emergency condition" exists with respect to such material, without the need to resort to multilateral action as required by § 2602. Even so, the President may not impose such import restrictions unless he considers the recommendations of a committee of experts, including representatives of museums. The export restrictions must also be limited in duration. 19 U.S.C. § 2603(c).

appeals' decision, any knowing importation of any object over which another country claims ownership through a cultural patrimony law is criminal, even though Congress determined in the CPIA that only a limited category of such imports should be barred. Had Congress in fact approved the "blank check" approach that the court of appeals followed in this case—under which it is criminal to import *any* cultural property with knowledge that a foreign state has declared such objects to be within its ownership—it is difficult to see why Congress would have restricted the import ban of § 2607 to properly inventoried cultural property stolen from a museum or similar institution, or why Congress would have hedged the President's authority to extend that import ban with so many restrictions.

The court of appeals remarked (Pet. App. 24a) that, according to the Senate Committee Report accompanying the CPIA, that law was not intended to modify other state or federal statutes that might apply to cultural property, specifically including the NSPA. *See* S. Rep. No. 97-564, at 22, 33. That observation is not responsive to our point. Congress of course did not intend enactment of the CPIA to preclude prosecution of one who steals antiquities from a museum or a private collection abroad and then transports the stolen artifacts to the United States. Prosecution under the NSPA in such circumstances would do nothing more than vindicate well-settled principles of property ownership familiar to our own legal system. By contrast, the UNESCO Convention and the CPIA, by rejecting the umbrella theory of a state's ownership of all cultural property within its borders, illustrate an understanding of property ownership that is inconsistent with the court of appeals' assumption that the NSPA recognizes governmental claims of property ownership that are completely foreign to our own legal system.

This case thus resembles *Dowling* v. *United States*, 473 U.S. 207 (1985), where this Court rejected a similar effort by the government to extend the NSPA beyond the conventional sphere of trafficking in stolen property. In *Dowling*, this Court concluded that a related provision of the NSPA, 18 U.S.C. § 2314, did not reach the interstate transportation

of "bootleg" recordings that had been manufactured and distributed without the consent of the copyright owners.[24] In reaching that conclusion, the Court first noted that, whereas the NSPA was principally intended to overcome jurisdictional obstacles to prosecution of those who steal property in one state and take it to another state, no such supplemental federal action was necessary with respect to copyright infringement, which lies within Congress's constitutional sphere of regulation. 473 U.S. at 220–221. The Court went on to review the history of congressional prohibitions against copyright infringement, from which it concluded that Congress had historically relied chiefly on civil remedies to deter such infringement and had acted with great caution in extending criminal prohibitions to the copyright area. *Id.* at 221–226. The Court thus determined that Congress should not be presumed to have adopted "an indirect but blunderbuss solution to a problem" that it "treated with precision when considered directly." *Id.* at 226.

So too here, the Court should not presume that Congress adopted the blunderbuss solution of criminalizing the importation of all property over which a foreign country claims ownership through an umbrella cultural patrimony law. As with copyright infringement, the importation of cultural property from foreign countries falls within Congress's constitutional regulatory authority (its power to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8), and there is no need to extend the NSPA to remove a jurisdictional obstacle to regulation of such importation. And, as with copyright infringement, Congress has acted with circumspection in restricting the importation of cultural prop-

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[24] Section 2314 punishes one who knowingly "transports, transmits, or transfers in interstate or foreign commerce" stolen property; Section 2315 punishes one who knowingly "receives, possesses, conceals, stores, barters, sells, or disposes of" stolen property that has crossed a state or United States border. The two provisions are construed *in pari materia*. *See, e.g., United States* v. *Rivalta*, 892 F.2d 223, 226-228 (2d Cir. 1989) (reviewing together defendants' convictions for interstate transport and receipt of stolen goods pursuant to § 2314 and § 2315).

erty, relying chiefly on the narrow civil provisions of the CPIA. We have also detailed above "[t]he broad consequences of the Government's theory" (*Dowling*, 473 U.S. at 226). Whether or not those broad consequences prove, as was the case in *Dowling*, to be "a final and dispositive factor against reading [the NSPA] in the manner suggested" (*id.*), they clearly warrant this Court's consideration of the matter before the Second Circuit's decision becomes, in effect, the last word.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

FREDERICK SCHULTZ,
Defendant-Appellant.

August Term, 2002
Docket No. 02-1357

Argued March 10, 2003
Decided June 25, 2003

[333 F.3d 393]

Before: MESKILL, CARDAMONE and CABRANES, *Circuit Judges.*

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Rakoff, *J.*, after a trial by jury. Affirmed

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MESKILL, *Circuit Judge*:

Defendant-appellant Frederick Schultz (Schultz) appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York, Rakoff, *J.*, after a trial by jury. Schultz was convicted of one count of conspiracy to receive stolen property that had been transported in interstate and foreign commerce, in violation of 18

U.S.C. § 371. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Appellate jurisdiction is appropriate because "[w]e have jurisdiction to consider appeals from final decisions of the district courts, which are judgments of conviction and sentence in criminal cases." *United States* v. *Ferguson*, 246 F.3d 129, 138 (2d Cir. 2001). *See also* 28 U.S.C. § 1291.

BACKGROUND

Schultz was a successful art dealer in New York City. On July 16, 2001, he was indicted on one count of conspiring to receive stolen Egyptian antiquities that had been transported in interstate and foreign commerce, in violation of 18 U.S.C. § 371. The underlying substantive offense was violation of 18 U.S.C. § 2315, the National Stolen Property Act (NSPA).

Schultz moved to dismiss the indictment, asserting that the items he was charged ***396** with conspiring to receive were not stolen within the meaning of the NSPA. Specifically, Schultz contended that the Egyptian antiquities he allegedly conspired to receive were not owned by anyone, and therefore could not be stolen. The prosecution asserted that the antiquities were owned by the Egyptian government pursuant to a patrimony law known as "Law 117" which declared all antiquities found in Egypt after 1983 to be the property of the Egyptian government. After an evidentiary hearing, the district court denied the motion to dismiss in a written memorandum and order. *See United States* v. *Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002). Schultz was tried before a jury in January and February 2002.

The following facts were adduced at trial.

In 1991, Schultz met Jonathan Tokeley Parry (Parry), a British national, through a mutual friend. Parry showed Schultz a photograph of an ancient sculpture of the head of Pharaoh Amenhotep III, and told Schultz that he had obtained the sculpture in Egypt earlier that year from a man who represented himself to be a building contractor. Parry had used an Egyptian middle-man named Ali Farag (Farag)

to facilitate the deal. Parry had smuggled the sculpture out of Egypt by coating it with plastic so that it would look like a cheap souvenir, then removed the plastic coating once the sculpture was in England.

Schultz offered Parry a substantial fee to serve as the agent for sale of the Amenhotep sculpture, which Parry accepted. Parry and Schultz discussed the problems that might arise if they were discovered to have the piece, and set out to create a false provenance for the sculpture, so that they could sell it. They decided that they would claim that the sculpture had been brought out of Egypt in the 1920s by a relative of Parry and kept in an English private collection since that time. Parry and Schultz invented a fictional collection, the "Thomas Alcock Collection," and represented to potential buyers that the sculpture came from this collection. With Schultz's knowledge, Parry prepared fake labels, designed to look as though they had been printed in the 1920s, and affixed the labels to the sculpture. Parry also restored the sculpture using a method popular in the 1920s.

Acting as Parry's agent, Schultz attempted to sell the Amenhotep sculpture to various parties, using the "Thomas Alcock Collection" story, but was unsuccessful. Eventually, Parry sold the sculpture to Schultz for $800,000, and Schultz sold it to a private collector in 1992 for $1.2 million. In June 1995, Robin Symes (Symes), who then owned the Amenhotep sculpture, asked Schultz to provide him with more details about the sculpture's origin, because he had learned that the Egyptian government was pursuing the sculpture. Schultz responded by asking questions regarding the Egyptian pursuit, but did not provide Symes with any additional information regarding the Amenhotep sculpture.

Parry and Schultz became partners, in a sense. They endeavored to bring more Egyptian antiquities into America for resale, smuggling them out of Egypt disguised as cheap souvenirs, assigning a false provenance to them, and restoring them with 1920s techniques. Parry testified about six items or groups of items, in addition to the Amenhotep sculpture,

that he and Schultz attempted to remove from Egypt and sell under the false provenance of the Thomas Alcock Collection.

In 1991, Parry smuggled a sculpture of Meryet Anum (a daughter of Pharoah Ramses II) out of Egypt and performed extensive restorations on it. Parry brought the sculpture to New York and ***397** showed it to experts who determined it to be a fake.

In 1992, Parry sold Schultz a black top vase for $672, informing Schultz that the vase had been brought out of Egypt. Parry affixed a Thomas Alcock Collection label to the vase. Schultz and Parry acquired this vase because they believed that including some less valuable pieces in the imaginary Thomas Alcock Collection would make the Collection more believable.

In 1992, Parry wrote to Schultz from Egypt, telling Schultz that he had obtained a sculpture he called "The Offeror." Parry smuggled The Offeror out of Egypt and performed extensive restoration work on it. Parry believed the sculpture was authentic until testing revealed it to be a fake. Parry delivered The Offeror to Schultz without informing him of either the extensive restorations or the fact that the sculpture was not authentic. However, when Schultz discovered the sculpture was a fake, he returned it to Parry. Later, when Parry was arrested, The Offeror was confiscated by British authorities. Schultz contacted the authorities attempting to claim The Offeror as his own, eventually sending a forged invoice purporting to show that Schultz had bought the sculpture from a New York art dealer and had given it to Parry only for restoration. Schultz did not succeed in claiming The Offeror.

In 1992, Parry and Farag learned that someone had reported them to the Egyptian authorities for dealing in antiquities. Due in part to the assistance of Farag's father, who was a powerful Egyptian government official, Parry and Farag were able to get their names removed from police records by paying a bribe to certain corrupt members of the Egyptian antiquities police. These same corrupt police officers then entered into a deal with Parry and Farag, offering

them a variety of antiquities in police possession in exchange for Parry and Farag paying off some debts owed by the police officers. Parry chose three items from the "bran tub"[1] full of items offered; he later sent those items to Schultz. Parry informed Schultz of how he had obtained the items. One of the items was marked with an Egyptian government registry number, which Parry succeeded in partially obliterating.

In 1992, Parry purchased the top half of a limestone sculpture of a striding figure, which he dubbed "George," from a group of Egyptian villagers. Apparently, when the sculpture had been found, it was in pieces, and the pieces were divided among rival groups of villagers. Parry wrote to Schultz telling him of the acquisition and informing Schultz that he was attempting to obtain George's bottom half. Parry also requested money to assist in the purchase of George and other items. Parry and Farag eventually succeeded in purchasing the bottom half of the sculpture, and reassembled the whole thing. Parry then coated George in plastic, and in plaster, and painted it to look like a tourist souvenir so it could be taken out of Egypt. Parry kept Schultz informed of his progress and eventually brought George to New York for Schultz to sell. When George was offered for sale, it was treated with 1920s restoration techniques and represented to be part of the Thomas Alcock Collection. Schultz was unable to sell George, and Parry requested that Schultz send George to Switzerland, where Parry planned to retrieve it. For reasons that are not clear from the record, Parry was not able to retrieve George.

In June 1994, Parry was arrested in Great Britain, and Farag was arrested in *398 Egypt. Each was charged with dealing in stolen antiquities. Schultz was aware of the arrests and communicated extensively with Parry after his arrest about Parry's legal situation. Parry and Schultz also continued to correspond regarding plans for new acquisitions.

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[1] A "bran tub" is a British term for a sort of "grab bag" selection of items.

In December 1994, Parry wrote to Schultz describing three limestone "stelae," or inscribed slabs, which had been discovered by builders in Egypt and were being offered for sale. Parry had an expert review photographs of the stelae, and the expert determined that the pieces were newly discovered and not listed in any of the catalogs of antiquities known to the Egyptian government. By 1995, there were ten pieces available from this find, and although Parry had been taken into custody in Great Britain, he continued attempting, with Schultz, to obtain the stelae. Schultz sent money for this purpose, and Parry directed that the pieces be shipped to Switzerland for Parry to retrieve in 1996. However, neither Parry nor Schultz ever actually obtained the stelae.

Throughout their partnership, Parry and Schultz communicated regularly; many of their letters were introduced in evidence by the government. Their letters indicate an awareness that there was a great legal risk in what they were doing. This awareness is reflected both in the content of the letters and in Parry's and Schultz's use of "veiled terms," code, or even languages other than English.

The jury found Schultz guilty on the sole count of the indictment, and on June 11, 2002, Schultz was sentenced principally to a term of 33 months' imprisonment. This appeal followed.

On appeal, the Court received three *amicus curiae* briefs. The National Association of Dealers in Ancient, Oriental & Primitive Art, Inc.; International Association of Professional Numismatists; The Art Dealers Association of America; The Antique Tribal Art Dealers Association; The Professional Numismatists Guild; and The American Society of Appraisers filed a brief in support of Schultz. An *ad hoc* group called Citizens for a Balanced Policy with Regard to the Importation of Cultural Property, made up of politicians, academics, and art collectors, also filed a brief in support of Schultz. These briefs argue primarily that allowing Schultz's conviction to stand would threaten the ability of legitimate American collectors and sellers of antiquities to do business. The Archaeological Institute of America; The American An-

thropological Association; The Society for American Archaeology; The Society for Historical Archaeology; and the United States Committee for the International Council on Monuments and Sites filed a brief in support of the United States. This brief argues primarily that sustaining Schultz's conviction and applying the NSPA to cases such as this one will help to protect archaeological and cultural sites around the world.

DISCUSSION

I. *Application of the NSPA to Cases Involving Patrimony Laws*

In order to preserve its cultural heritage, Egypt in 1983 enacted a "patrimony law" which declares all antiquities discovered after the enactment of the statute to be the property of the Egyptian government. The law provides for all antiquities privately owned prior to 1983 to be registered and recorded, and prohibits the removal of registered items from Egypt. The law makes private ownership or possession of antiquities found after 1983 illegal. Schultz's primary argument is that the NSPA does not apply to cases in which an object was "stolen" only in the sense ***399** that it was possessed or disposed of by an individual in violation of a national patrimony law, as opposed to "stolen" in the commonly used sense of the word, for instance, where an object is taken from a museum or a private collection. The government contends that the plain language of the NSPA indicates that the NSPA applies to *any* stolen property, regardless of the source of the true owner's title in the property. The question, in other words, is whether an object is "stolen" within the meaning of the NSPA if it is an antiquity which was found in Egypt after 1983 and retained by an individual (and, in this case, removed from Egypt) without the Egyptian government's consent.

The NSPA reads, in pertinent part, as follows:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000

> or more ... which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken ... [s]hall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2315 (2000).

This statute is unambiguous. It applies to goods that are "stolen, unlawfully converted, or taken." *Id.* Goods that belong to a person or entity and are taken from that person or entity without its consent are "stolen" in every sense of that word. *See, e.g., Black's Law Dictionary* 989-90 (6th ed. abr. 1991) (defining "stolen" as "[a]cquired or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently"); *Webster's Third New International Dictionary* 2248 (1971) (defining "stolen" as "obtained or accomplished by theft, stealth, or craft"). Accordingly, Schultz's actions violated the NSPA if the antiquities he conspired to receive in the United States belonged to someone who did not give consent for Schultz (or his agent) to take them. That "someone" is the nation of Egypt.

In 1983, Egypt enacted Law 117. The law, which is entitled "The Law on the Protection of Antiquities," reads, in pertinent part, as follows:

> ***Article 1***
>
> An "Antiquity" is any movable or immovable property that is a product of any of the various civilizations or any of the arts, sciences, humanities and religions of the successive historical periods extending from prehistoric times down to a point one hundred years before the present, so long as it has either a value or importance archaeologically or historically that symbolizes one of the various civilizations that have been established in the land of Egypt or that

has a historical relation to it, as well as human and animal remains from any such period.

* * *

Article 6

All antiquities are considered to be public property--except for charitable and religious endowments. . . . It is impermissible to own, possess or dispose of antiquities except pursuant to the conditions set forth in this law and its implementing regulations.

Article 7

As of [1983], it is prohibited to trade in antiquities.

* * *

Article 8

With the exception of antiquities whose ownership or possession was already established ***400** [in 1983] or is established pursuant to [this law's] provisions, the possession of antiquities shall be prohibited as from [1983].

Law 117 includes a chapter entitled "Sanctions and Penalties" detailing the criminal penalties to be imposed on persons found to have violated the law. This section provides, *inter alia*, that a person who "unlawfully smuggles an antiquity outside the Republic or participates in such an act shall be liable to a prison term with hard labor and a fine of not less than 5,000 and not more than 50,000 pounds." A person who steals or conceals a state-owned antiquity faces a prison term of three to five years and a minimum fine of 3,000 pounds. A person who removes or detaches an antiquity from its place, counterfeits an antiquity, or unlawfully disposes of an antiquity faces a prison term of one to two years and a minimum fine of 100 pounds. A person who writes on, posts notices on, or accidentally defaces an antiquity faces a prison term of three to twelve months and/or a fine of 100 to 500 pounds.

Schultz moved in the district court to dismiss the indictment on the ground that Law 117 did not vest true ownership rights in the Egyptian government, and, accordingly, the

items he conspired to smuggle out of Egypt were not "stolen" within the meaning of the NSPA. In response to Schultz's motion, the district court conducted an evidentiary hearing regarding Law 117 pursuant to Federal Rule of Criminal Procedure 26.1.[2] At that hearing, two Egyptian officials testified as fact witnesses for the government: Dr. Gaballa Ali Gaballa and General Ali El Sobky.

Dr. Gaballa is Secretary General of Egypt's Supreme Council of Antiquities, which is a part of the Ministry of Culture. The Supreme Council employs more than 20,000 people. Dr. Gaballa was asked: "Who owns all newly discovered antiquities?" He responded: "The Egyptian government, of course." Dr. Gaballa clarified that people who owned antiquities prior to the adoption of Law 117 in 1983 are permitted to continue to possess the antiquities, but they may not transfer, dispose of, or relocate the antiquities without notifying the Egyptian government. Dr. Gaballa testified that pursuant to Law 117, when the Egyptian government learns that an antiquity has been discovered, agents of the government immediately take possession of the item. The item is then registered and given a number.

In response to questioning by the court, Dr. Gaballa asserted that there are no circumstances under which a person who finds an antiquity in Egypt may keep the antiquity legally. The person who found the antiquity is not compensated for the item, because it never belonged to the finder. The only time compensation is paid is when a person owns a plot of land on which an immovable structure is located, and the government takes possession of the entire plot of land in

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[2] Rule 26.1 reads, in pertinent part, as follows: "Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence." Fed. R. Crim. P. 26.1 (2003). The Advisory Committee Note to this Rule specifically acknowledges that the Rule may be applicable where "[t]he content of foreign law may . . . be relevant in proceedings arising under 18 U.S.C. §§ 1201, 2312 to 2317." Fed. R. Crim. P. 26.1 advisory committee's note.

order to possess the structure; in such a case, only the value of the land itself, and not the value of the structure, is taken into account in determining the amount of payment.

*401 The court also asked Dr. Gaballa whether Law 117 had been used to bring legal actions against persons in Egypt who did not comply with the law, but did not attempt to remove an antiquity from Egypt. Dr. Gaballa responded that he was aware of cases in which Law 117 had been applied to persons whose violations of the law took place entirely inside Egypt.

The government's second witness, General El Sobky, is the Director of Criminal Investigations for the Egyptian Antiquities Police. General El Sobky testified that his department, which employs more than 400 officers, regularly investigates and prosecutes people for violating Law 117. General El Sobky testified that most of the Law 117 investigations and prosecutions conducted by his department are of people who are trafficking in antiquities *within* Egypt, as opposed to exporting them out of Egypt. Furthermore, General El Sobky testified, even when a person is acquitted in such a prosecution, if the person is found to possess an antiquity, that antiquity is seized and retained by the government.

Schultz called one expert witness at the hearing, Khaled Abou El Fadl, a professor of Islamic and Middle Eastern law at the University of California—Los Angeles (UCLA) Law School. Professor Abou El Fadl opined that Law 117 was at times ambiguous and confusing. He further testified that the language of Law 117 did not make it clear whether the law "intended to keep the antiquities inside of Egypt or actually was asserting governmental ownership over the antiquities." Professor Abou El Fadl asserted that "nothing in Law 117 prevents the Antiquities Authority from leaving physical possession of even an antiquity discovered after 1983 in the hands of a private finder, so long as the private finder promptly notifies the Authority of his find."

On cross-examination, Professor Abou El Fadl stated that he had never practiced law in Egypt, nor was he licensed to practice law in Egypt. He testified that he had never read

Law 117 prior to being requested to do so by Schultz's counsel, and that he had been unable to locate any treatises discussing Law 117.

Schultz contends that in spite of its plain language, Law 117 is not a "real" ownership law, and that Egypt does not truly claim ownership over all antiquities, but merely seeks to restrict their export. The district court disagreed, finding, based substantially on the testimony and other evidence presented at the hearing, that the plain language of Law 117 accurately reflects its purpose and effect: to vest absolute and true ownership of all antiquities found in Egypt after 1983 in the Egyptian government. *See Schultz*, 178 F. Supp. 2d at 448.

"Issues of foreign law are questions of law," Fed. R. Crim. P. 26.1 (2003), and accordingly we review the district court's findings regarding Law 117 *de novo*. *See Curley* v. *AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998) ("[A] court's determination of foreign law is treated as a question of law, which is subject to *de novo* review." (citing parallel rule Fed. R. Civ. P. 44.1)).

Schultz failed to present any evidence at the hearing or at trial that Law 117 is not what its plain language indicates it is, that is, an ownership law. Professor Abou El Fadl's opinion that the law is ambiguous cannot overcome the combination of (1) the plain text of the statute, and (2) the testimony of two Egyptian government officials to the effect that the statute is a true ownership law and is enforced as such. Although Professor Abou El Fadl testified that he believed it would be *possible* for Egyptian authorities to leave antiquities in the possession of private individuals who discovered them, Schultz offered no evidence ***402** that the authorities ever *actually* had *permitted* an individual to retain an antiquity found after 1983. The Egyptian government officials testified that there was no legal way for a private individual to retain possession of an antiquity discovered after 1983, and that all such antiquities are seized by the government.

Law 117 defines "antiquity" and prescribes the procedure to be followed by persons in possession of antiquities at

the time the Law takes effect, and by persons who discover antiquities thereafter. It sets forth serious criminal penalties for the violation of its provisions. It provides for licensure of certain foreign archaeological missions, and for circumstances under which antiquities may be donated by the government to foreign museums in appreciation of those missions' work. The Law's provisions are directed at activities within Egypt as well as export of antiquities out of Egypt. Law 117 makes it clear that the Egyptian government claims ownership of all antiquities found in Egypt after 1983, and the government's active enforcement of its ownership rights confirms the intent of the Law. Accordingly, we conclude that Law 117 is clear and unambiguous, and that the antiquities that were the subject of the conspiracy in this case were owned by the Egyptian government.

The question thus becomes whether Schultz's actions in conspiring to take antiquities owned by the Egyptian government pursuant to Law 117 out of Egypt violate the NSPA. Schultz argues that even if Law 117 does intend to vest true ownership of all antiquities with the Egyptian government, that sort of "ownership" should not be recognized by the United States for purposes of prosecution under the NSPA.

Schultz urges us to adopt a narrow reading of the NSPA. However, the Supreme Court and this Court have acknowledged that the NSPA has a "broad purpose," *McElroy* v. *United States*, 455 U.S. 642, 655 (1982), and that "the statute should be broadly construed." *United States* v. *Wallach*, 935 F.2d 445, 469 (2d Cir. 1991) (citing *Moskal* v. *United States*, 498 U.S. 103, 113 (1990)). We have held that the language of the NSPA "is broad enough to justify the federal courts in applying the statute whenever they determine that the [property was] stolen in another country." *United States* v. *Greco*, 298 F.2d 247, 251 (2d Cir. 1962); *see also United States* v. *Parness*, 503 F.2d 430, 440 n.14 (2d Cir. 1974) (citing *Greco* with approval). Accordingly, there can be no doubt that if the antiquities involved in the conspiracy were stolen in Egypt

and then shipped to the United States, the NSPA would be violated.

Just as the property need not be stolen in the United States to bring the NSPA into play, the fact that the rightful owner of the stolen property is foreign has no impact on a prosecution under the NSPA. *See United States* v. *Frazier*, 584 F.2d 790, 794 (6th Cir. 1978) ("The court ruled that even if it were conceded that the defendants would be able to prove beyond a reasonable doubt that" the victim was a foreign company, the NSPA would still apply. "This was clearly a correct interpretation of the statute."). Furthermore, this Court has held that the NSPA applies to stolen property even where the person from whom the property was stolen may not have been the true owner of the property, and that the validity of the victim's title in the property is sometimes "irrelevant." *United States* v. *Benson*, 548 F.2d 42, 46 (2d Cir. 1977).[3] Accordingly, it does ***403** not matter that the antiquities at issue here were stolen in a foreign country, or that their putative owner is a foreign entity.

Notwithstanding all of the above, Schultz insists that the antiquities are not "stolen" within the meaning of the NSPA because they were never truly owned by the Egyptian government. The leading opinion addressing this question was issued by the Fifth Circuit, over 25 years ago, in *United States* v. *McClain*, 545 F.2d 988 (5th Cir. 1977). The parties frame the question on appeal as whether the Second Circuit should adopt the reasoning set forth by the Fifth Circuit in *McClain*.

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[3] *Benson* involved a prosecution under a different section of the NSPA, 18 U.S.C. § 2314, which prohibits the *transport* of stolen property, as opposed to the *receipt* of stolen property, which is prohibited by § 2315. Our precedent interpreting § 2314 is persuasive in considering § 2315, as the two sections merely address different aspects of the same type of criminal behavior, namely dealing in stolen property, and both are part of the same legislative scheme.

Schultz asserts that we should reject the holding in *McClain* based on existing Second Circuit precedent, which he reads as being hostile to *McClain* in the Second Circuit. Schultz then raises several additional arguments in support of his position, namely: (1) that *McClain*'s approach conflicts with United States policy, (2) that the enactment of the Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. §§ 2601-2613 (CPIA), "confirms that Congress never intended [the] NSPA to reach ownership claims based upon national vesting laws when the property has not been reduced to the possession of the foreign state," and (3) that the common law definition of "stolen" would not reach the property at issue here. We address each of these arguments in turn.

A. *McClain in the Second Circuit*

The *McClain* defendants were convicted of conspiring to violate the NSPA by importing artifacts from Mexico that were covered by a Mexican law declaring all such artifacts to be owned by the Mexican government. *See id.* at 992. The defendants claimed, as Schultz does here, that the NSPA did not apply to "stolen" objects that were taken in violation of patrimony laws. *See id.* at 994. The Fifth Circuit concluded that the NSPA did apply to such objects.[4] *See id.* at 996-97.

The *McClain* Court cited precedent according an expansive meaning to the term "stolen" in the NSPA, including *United States* v. *Handler*, 142 F.2d 351, 353 (2d Cir. 1944), which held that embezzled property is "stolen" within the meaning of the NSPA. *See McClain*, 545 F.2d at 995 (citing cases). The *McClain* Court also cited *United States* v. *Bottone*, 365 F.2d 389, 393-94 (2d Cir. 1966). In *Bottone*, the defendants photocopied documents detailing secret manufacturing processes, and transported the photocopies across state lines. *See Bottone*, 365 F.2d at 391. The original documents

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[4] The *McClain* Court reversed the convictions on other grounds. *See id.* at 1003.

were taken from the rightful owner only briefly for copying, and were never transported in interstate or foreign commerce. *See id.* at 393. The Court found that the transport of the photocopies violated the NSPA, and the fact that the photocopies were "never possessed by the original owner should be deemed immaterial." *Id.* at 393-94.

The *McClain* Court also distinguished between mere unlawful export and actual theft, holding that "a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen,' within the meaning of the [NSPA]." *McClain*, 545 F.2d at 1000-01. ***404** The court engaged in a close study of the Mexican patrimony law, including its language, history and purpose, and concluded that the Mexican government had made a declaration of national ownership satisfying this standard. *See id.* at 997-1000. As discussed above, Egypt has made a clear declaration of national ownership through Law 117, and has enforced that law accordingly.

Summarizing its decision in *McClain* the Fifth Circuit stated:

> This conclusion is a result of our attempt to reconcile the doctrine of strict construction of criminal statutes with the broad significance attached to the word "stolen" in the NSPA. Were the word to be so narrowly construed as to exclude coverage, for example, with respect to pre-Columbian artifacts illegally exported from Mexico after the effective date of the 1972 [patrimony] law, the Mexican government would be denied protection of the [NSPA] after it had done all it reasonably could do [to vest] itself with ownership to protect its interest in the artifacts. This would violate the apparent objective of Congress: the protection of owners of stolen property. If, on the other hand, an object were considered "stolen" merely because it was illegally exported, the meaning of the term "stolen" would be stretched beyond its conventional meaning. Although "stealing" is not a term of art, it is also not a

> word bereft of meaning. It should not be expanded at the government's will beyond the connotation depriving an owner of its rights in property conventionally called to mind.

McClain, 545 F.2d at 1001-02 (footnotes omitted). We agree that the Fifth Circuit reached the proper balance between these competing concerns in *McClain*.

i. *Hollinshead*

Although *McClain* is often described as the only federal appeals court case to have considered the application of the NSPA to property deemed stolen under a foreign patrimony law, the issue was actually first encountered by the Ninth Circuit three years before *McClain* in *United States* v. *Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). The facts of *Hollinshead* are very similar to those in the case at hand. "Hollinshead, a dealer in pre-Columbian artifacts, arranged with one Alamilla, a co-conspirator, to procure such artifacts in Central America, and to finance Alamilla in doing so." *Id.* at 1155. Once the artifacts were obtained, they were shipped to Hollinshead in the United States. *See id.*

Hollinshead was convicted of conspiracy to transport stolen property in interstate and foreign commerce, in violation of 18 U.S.C. § 2314. *See id.* The trial centered on a particular artifact that had been found in a Mayan ruin in the jungle of Guatemala and eventually shipped to Hollinshead. *See id.* The artifact was "stolen" as defined by the NSPA because under Guatemalan law "all such artifacts are the property of the Republic, and may not be removed without permission of the government." *Id.* As occurred in this case, the district court had received testimony regarding the law of Guatemala as applied to such artifacts. *See id.*

The Ninth Circuit was not presented in *Hollinshead* with a direct attack on the application of the NSPA to cases involving patrimony laws; that was not the basis of the defendant's appeal. However, the Ninth Circuit's discussion indicates its acceptance of the prosecution's theory in *Hollinshead* that an object is "stolen" within the meaning of the

NSPA if it is taken in violation of a patrimony law. *See id.* at 1156. We are aware of no other ***405** federal appeals court that has reached this issue.

The Second Circuit has rarely addressed *McClain* and has never decided whether the holding of *McClain* is the law in this Circuit. *See United States* v. *Long Cove Seafood*, 582 F.2d 159, 163, 165 (2d Cir. 1978) (*Long Cove*); *United States* v. *An Antique Platter of Gold*, 184 F.3d 131, 134 (2d Cir. 1999) (*Steinhardt*).[5] Although Schultz asserts that these cases support his position, we disagree with his interpretation of these precedents.

ii. *Long Cove*

The defendants in *Long Cove* were charged with violating the NSPA by taking undersized clams from Long Island Sound and selling them to area restaurants. *See Long Cove*, 582 F.2d at 161, 162. There was no dispute that the practice of harvesting and selling undersized clams violated various environmental laws; the question was whether the transport of these clams across state lines constituted the interstate transport of "stolen" goods under the NSPA. *See id.* at 162-63. The government argued that the clams were "stolen" from the State of New York because of a New York law that provides:

> The State of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects thereby consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition.

Id. at 164 (quoting N.Y. Envtl. Conserv. Law § 11-0105).

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[5] We also cited to *McClain*, without discussion, in *United States* v. *Bennett*, 665 F.2d 16, 22 (2d Cir. 1981).

The Court stated that the key question was "whether New York has asserted a true ownership interest in wildlife such as the Fifth Circuit, in [*McClain*], held that Mexico has done since 1972 with respect to pre- Columbian artifacts. We think not." *Id.* at 165. The Court emphasized that the New York statute stated that the purpose of asserting ownership was only to regulate and control the use and disposition of wildlife, not to actually take possession of it. *See id.* The Court further noted that while New York claimed to own the wildlife, it was not liable for an attack by any wild animal, as a private owner of such an animal would be. *See id.*

The distinctions between the facts of the *Long Cove* case and the facts of the case at hand are clear and require a different outcome here. First, as the testimony before the district court made clear, Egypt *does* assert a possessory interest in antiquities pursuant to Law 117. While the State of New York has never attempted to seize all wildlife found within its borders, Dr. Gaballa testified that the Egyptian government actively pursues any person found to have obtained an antiquity and takes immediate possession of all antiquities of which it becomes aware.

Second, both Dr. Gaballa and General El Sobky confirmed that the purpose of Law 117 is to bring all newly discovered antiquities within the direct possession and control of the Egyptian government in order to ensure that they are properly preserved and documented. Hundreds of antiquities police are employed by the Egyptian government solely to effectuate this purpose. To the contrary, the purpose of the New York law is simply to control the use and ***406** disposition of wildlife. *See Long Cove*, 582 F.2d at 164-65.

Third, the New York law explicitly excepts those wildlife "legally acquired and held in private ownership." *Id.* at 164. Law 117 provides for *no exceptions* for private ownership of antiquities discovered after the effective date of the law.[6] It

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[6] Law 117 does provide an exception for antiquities "whose ownership or possession was already established at the time th[e] law came into ef-

is legal under certain circumstances for a private person to obtain and dispose of wildlife in New York, for instance, by obtaining a hunting, fishing or trapping license. *See, e.g.*, N.Y. Envtl. Conserv. Law § 11-0701(4) (McKinney 2003) ("A fishing license entitles the holder to take fish by angling, spearing, hooking, longbow and tipups, to take frogs by spearing, catching with the hands or by use of a club or hook, and to take bait fish for personal use."). When a licensed hunter or fisherman catches wildlife in New York, it is his to keep and dispose of as he chooses.

In Egypt, on the other hand, it is impossible for a private party to get a license to obtain, possess or dispose of antiquities. Law 117 does provide in Article 34 for "foreign missions" to receive archaeological exploration and excavation licenses. However, Article 35 states that "[a]ll antiquities discovered by foreign archaeological excavation missions shall be state owned." If the Antiquities Authority determines that the foreign mission is "outstanding," and has performed "important excavation and restoration work," the Authority may reward the mission by donating certain antiquities which "are expendable by reason of their similarity to other items excavated from the same location." Even then, the donated antiquities must be "thoroughly examined and

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fect." Schultz argues that this provision renders Law 117 ambiguous, because it suggests that the Egyptian government does not truly intend to own *all* antiquities; we cannot agree. Schultz's expert, Professor Abou El Fadl, testified that Egypt has a constitutional provision which, like the United States Constitution, prohibits the taking of private property by the government without compensation. Providing an exception to the general rule of government ownership for those who already had legal possession of antiquities prior to the adoption of Law 117 avoids the problem of having to pay compensation to those private owners. Viewed in this light, the exception actually supports the government's position that Law 117 represents an effort to obtain true ownership and actual possession of all antiquities; if Law 117 were merely an export law, there would be no need to exempt existing owners, as their property rights would not be affected as long as they made no attempt to export their antiquities.

fully recorded," and may only be donated to a museum, not to the excavators themselves.

We also note that in *Long Cove* we were not called upon to rule directly on the application of the NSPA to property owned pursuant to a patrimony law, and we did not question the correctness of *McClain*. *Long Cove* cited *McClain* more than once, in a positive light, which is significant in light of the considerable publicity the Fifth Circuit's controversial holding in *McClain* had generated at the time. *See Long Cove*, 582 F.2d at 163, 165. These citations give no indication that the Court disapproved of the outcome or analysis of *McClain*.

iii. *Steinhardt*

Schultz also contends that our decision in *Steinhardt* indicates that we have rejected the holding of *McClain*. In *Steinhardt*, the district court had found that an Italian antiquity should be forfeited by Steinhardt, who had imported it into the United States, because (1) Steinhardt had made material misrepresentations on a customs form or, (2) in the alternative, the ***407** antiquity was properly owned by the Italian government pursuant to a patrimony law and was therefore stolen property within the meaning of the NSPA and subject to forfeiture. *See Steinhardt*, 184 F.3d at 134. On appeal, we concluded that Steinhardt had made a material misstatement on a customs form when he represented that the antiquity was from Switzerland, not Italy. *See id.* at 137. Accordingly, the Court concluded that the antiquity was subject to forfeiture.[7] *See id.* at 138. The Court declined to reach the

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[7] *Steinhardt* involved the application of 18 U.S.C. § 545. As we explained:

> Section 545 prohibits the importation of merchandise into the United States "contrary to law" and states that material imported in such a manner "shall be forfeited." 18 U.S.C. § 545. The government claims that the importation of [the Italian antiquity] was illegal because it violated 18 U.S.C. § 542, which

alternative ground relied on below, stating: "We need not . . . address whether the NSPA incorporates concepts of property such as those contained in the Italian patrimony laws." *Id.* at 134.

It is irrelevant that we previously reviewed a case in which it was not necessary to reach the question now before us. It is not at all uncommon for us to decline to reach an issue when the case before us can be resolved on other grounds. *See, e.g., Wexner* v. *First Manhattan Co.*, 902 F.2d 169, 174 (2d Cir. 1990) ("[I]n light of our determination that the district court should be affirmed on other grounds, we find it neither necessary nor appropriate to reach this issue today."). Our failure to address a question that is not necessary to the outcome of a case is simply a wise exercise of our discretion. *See United States* v. *United States Gypsum Co.*, 333 U.S. 364, 402 (1948) (Frankfurter, *J.*, concurring in part) ("Deliberate *dicta*, I had supposed, should be deliberately avoided. Especially should we avoid passing gratuitously on an important issue of public law where due consideration of it has been crowded out by complicated and elaborate issues that have to be decided.").[8] We find Schultz's reliance on *Steinhardt* unpersuasive.

> prohibits the making of false statements in the course of importing merchandise into the United States.

Steinhardt, 184 F.3d at 134-35 (internal footnote omitted).

[8] The dangers inherent in a court's reaching out to decide issues not essential to the outcome of the case before it were perhaps most colorfully described by the 19th century English jurist Lord Justice Bowen, who has been quoted by our Supreme Court as saying:

> I am extremely reluctant to decide anything except what is necessary for the special case, because I believe by long experience that judgments come with far more weight and gravity when they come upon points which the Judges are bound to decide, and I believe that obiter dicta, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases.

B. *United States Policy*

Schultz contends that it is United States policy not to enforce the export restrictions of foreign nations. Schultz offers no evidence in support of this assertion, but even if his assessment of United States policy is accurate, the outcome of this case is unaffected. We have already concluded, based on the plain language of Law 117 and the evidence in the record, that Law 117 is an ownership law, not an export-restriction law. Two Egyptian officials testified under oath that the law is used in Egypt to prosecute people for trafficking in antiquities *within Egypt's borders*. Law 117 provides for a minimum five-year ***408** prison term and a fine of 3,000 pounds for persons convicted of "[t]heft or concealment of a state owned antiquity." Persons convicted of smuggling an antiquity out of Egypt face "a prison term with hard labor and a fine of not less than 5,000 and not more than 50,000 pounds." Clearly, theft or concealment of an antiquity within Egypt is a different offense than smuggling an antiquity out of Egypt, and *both* are prohibited by Law 117. Accordingly, even if Schultz's interpretation of American policy is accurate, it is not relevant here. While Law 117 does restrict exportation of cultural objects, its scope is not limited to export restrictions. Law 117 is more than an export regulation—it is a true ownership law.

C. *The CPIA*

Schultz contends that the adoption of the CPIA shows that Congress did not intend the NSPA to apply to objects such as the ones he conspired to bring to the United States. The CPIA implements a United Nations convention that was ratified by the United States in 1982, the purpose of which was to achieve "greater international cooperation towards preserving cultural treasures that not only are of importance to the nations whence they originate, but also to greater in-

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Darr v. *Burford*, 339 U.S. 200, 214 (1950), *overruled in part on other grounds by Fay* v. *Noia*, 372 U.S. 391 (1963).

ternational understanding of our common heritage." S. Rep. No. 97-564, at 21 (1982).

The CPIA provides a mechanism for the American government to establish import restrictions on "cultural property" at the request of another signatory nation and after a determination by the President that (1) "the cultural patrimony of [the requesting nation] is in jeopardy from the pillage of archaeological or ethnological materials of [that nation]," (2) the requesting nation "has taken measures . . . to protect its cultural patrimony," (3) the import restrictions are necessary and would be effective in dealing with the problem, and (4) the restrictions are in the "general interest of the international community." 19 U.S.C. § 2602(a)(1)(A)-(D) (2003).

Schultz argues that the CPIA was intended to be the only mechanism by which the United States government would deal with antiquities and other "cultural property" imported into the United States. However, nothing in the language of the CPIA supports that interpretation, and the legislative history shows that exactly the converse is true. As the district court correctly noted, *Schultz*, 178 F. Supp. 2d at 449, the Senate Report on the CPIA expressly states that the CPIA "neither pre-empts state law in any way, nor modifies any Federal or State remedies that may pertain to articles to which [the CPIA's] provisions . . . apply." S. Rep. No. 97-564, at 22 (1982). Furthermore, the Senate Report states that the CPIA "affects neither existing remedies available in state or federal courts nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce (*e.g.*, *National Stolen Property Act*, Title 18, U.S.C. Sections 2314-15)." *Id.* at 33 (emphasis added).

The CPIA also bars the importation of items that have been stolen from a museum or other cultural institution in a foreign signatory nation. *See* 19 U.S.C. § 2607. Schultz argues that because only those items that are stolen *from specified places* are covered by the CPIA, Congress never intended in any way to limit the import of items "stolen" only in the sense that they were taken in violation of patrimony laws.

This argument is unpersuasive. The CPIA does not state that importing objects stolen from somewhere *other than* a museum is legal. If, for instance, an artifact covered by the CPIA were stolen from a private home in a signatory nation and imported into the United States, the CPIA *409 would not be violated, but surely the thief could be prosecuted for transporting stolen goods in violation of the NSPA.

The CPIA is an import law, not a criminal law; it is not codified in Title 18 ("Crimes and Criminal Procedure"), with the NSPA, but in Title 19 ("Customs Duties"). It may be true that there are cases in which a person will be violating both the CPIA and the NSPA when he imports an object into the United States. But it is not inappropriate for the same conduct to result in a person being subject to both civil penalties and criminal prosecution, and the potential overlap between the CPIA and the NSPA is no reason to limit the reach of the NSPA. *See, e.g., Hudson* v. *United States*, 522 U.S. 93, 98-99 (1997) (holding that a person may be subjected to civil and criminal penalties for the same conduct without violating the Double Jeopardy Clause).

For the reasons set forth above, we conclude that the passage of the CPIA does not limit the NSPA's application to antiquities stolen in foreign nations.[9]

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[9] Schultz notes that Senator Moynihan stated, after the adoption of the CPIA, that part of the compromise reached in passing that law included an agreement to later amend the NSPA to overrule *McClain*. *See* 131 Cong. Rec. S2598-03 (Mar. 6, 1985). Senator Moynihan introduced legislation on two occasions which would have done just that; however, neither bill passed. Accordingly, although it may have been Senator Moynihan's belief that the Congress intended to overrule *McClain* in *separate legislation* after the adoption of the CPIA, that never actually happened. We note that this history further supports our holding that the CPIA itself did nothing to overrule *McClain* or alter the effect of the NSPA with regard to foreign antiquities.

D. *Common Law Definition of "Stolen"*

Schultz argues that the Court must look to the common law definition of "stolen" to determine whether the antiquities at issue are covered by the NSPA.[10] Schultz cites *United States* v. *Turley*, 352 U.S. 407 (1957), in which the Supreme Court considered the meaning of the term "stolen" in the context of the statute that served as the precursor and model for the NSPA. *See id.* at 410-11. The Supreme Court stated: "We recognize that where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *Id.* at 411. Schultz contends that interpreting the NSPA to apply to items that are "stolen" in the sense that they are possessed by a defendant in violation of a foreign patrimony law would be in derogation of the common law. However, in *Turley*, the Supreme Court explicitly recognized that " 'stolen' (or 'stealing') has no accepted common-law meaning." *Id.* If "stolen" has no common law meaning, we cannot look to the common law to assist us in interpreting that term.

The Supreme Court also stated in *Turley* that the term "stolen" included "all felonious takings ... regardless of whether or not the theft constitutes common-law larceny." *Id.* at 417. In other words, according to the Supreme Court, the precursor to the NSPA—and by extension the NSPA—covers a broader *410 class of crimes than those contemplated by the common law. Accordingly, we find this argument unpersuasive.

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[10] Schultz also argues that because a thing can only be "stolen" if it is already owned, then the term "ownership" is implied in the NSPA (although that word never appears anywhere in the text of the NSPA), and accordingly, we must determine the common law meaning of "ownership." We decline to accept this invitation to delve into the meaning of a term that is not even present in an unambiguous statute.

E. *Summary*

In light of our own precedents and the plain language of the NSPA, we conclude that the NSPA applies to property that is stolen in violation of a foreign patrimony law. The CPIA is not the exclusive means of dealing with stolen artifacts and antiquities, and reading the NSPA to extend to such property does not conflict with United States policy. We believe that, when necessary, our courts are capable of evaluating foreign patrimony laws to determine whether their language and enforcement indicate that they are intended to assert true ownership of certain property, or merely to restrict the export of that property. In this case, the district court carefully evaluated the language of Law 117. The court also heard testimony from one academic expert and two Egyptian government officials. This evidence was sufficient to inform the court of the nature of Egypt's interest in the antiquities that were the subject of the conspiracy.

Although we recognize the concerns raised by Schultz and the *amici* about the risks that this holding poses to dealers in foreign antiquities, we cannot imagine that it "creates an insurmountable barrier to the lawful importation of cultural property into the United States." Our holding does assuredly create a barrier to the importation of cultural property owned by a foreign government. We see no reason that property stolen from a foreign sovereign should be treated any differently from property stolen from a foreign museum or private home. The *mens rea* requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods, while our appropriately broad reading of the NSPA will protect the property of sovereign nations.

II. *Defense of Mistake of United States Law*

Schultz argues on appeal that the district court erred in refusing to allow him to present a defense of mistake of law. Specifically, Schultz sought to argue to the jury that he did

not know that importing antiquities owned by the Egyptian government pursuant to Law 117 violated the NSPA.[11] The government contends that the district court was correct to bar this defense, relying on "the venerable principle that ignorance of the law generally is no defense to a criminal charge." *Ratzlaf* v. *United States*, 510 U.S. 135, 149 (1994).

Schultz concedes that this is the general rule, but asserts that certain exceptions exist. Schultz cites three cases in which he contends that the Supreme Court found a defense of mistake of law was proper: *Ratzlaf*, 510 U.S. at 137 ("To establish that a defendant 'willfully violat [ed]' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful."); *Cheek* v. *United States*, 498 U.S. 192, 200 (1991) (interpreting "the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule" that mistake of law is no defense); and *Liparota* v. *United States*, 471 U.S. 419, 426 (1985) (reading food stamp fraud provision to include a requirement that the defendant knew that his actions were unlawful, where "to interpret the statute otherwise would be to criminalize a ***411** broad range of apparently innocent conduct").

In addition, Schultz cites two federal appellate decisions from other circuits. In *United States* v. *Lizarraga-Lizarraga*, 541 F.2d 826 (9th Cir. 1976), the Ninth Circuit reversed a defendant's conviction for illegal export of ammunition to Mexico because the district court had failed to instruct the jury that the defendant could be convicted only if he knew it was illegal to transport ammunition to Mexico. *See id.* at 828. Similarly, in *United States* v. *Grigsby*, 111 F.3d 806 (11th Cir. 1997), the Eleventh Circuit reversed the conviction of a defendant for illegally importing elephant tusks because the district court had failed to instruct the jury that the defen-

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[11] This argument is referred to by the parties as the "mistake of American law defense." Schultz was permitted to present a "mistake of Egyptian law defense" to the jury.

dant could be convicted only if he knew importing the items was illegal. *See id.* at 821, 834. Each of the cases relied on by Schultz is inapposite, for two reasons.

First, these decisions involve specific intent statutes. For instance, the statute at issue in *Lizarraga-Lizarraga* (now repealed) made it unlawful "willfully" to export certain items to Mexico. *See Lizarraga--Lizarraga*, 541 F.2d at 827. The inclusion of the term "willfully," the court found, made it clear that Congress intended to punish only those who exported ammunition knowing it was unlawful to do so. *See id.* at 828. Likewise, the statute of conviction in *Grigsby* specified that "[w]hoever *knowingly violates* section 4223 of this title" would be subject to criminal penalties. 16 U.S.C. § 4224 (2000) (emphasis added). The tax statute at issue in *Cheek* and the antistructuring statute at issue in *Ratzlaf* each also specified that only defendants who "willfully" violated the law would be subject to prosecution. *See* 26 U.S.C. §§ 7201, 7203; 31 U.S.C. § 5322.

The NSPA does not include the term "willfully." The section of the NSPA applicable to Schultz reads as follows:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more ... which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, *knowing the same to have been stolen, unlawfully converted, or taken* ... [s]hall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 2315 (2000) (emphasis added). The *only* knowledge requirement in the NSPA is knowledge that the goods were "stolen, unlawfully converted, or taken." *Id.*; *see United States* v. *Rosa*, 17 F.3d 1531, 1546 (2d Cir. 1994) (noting that the NSPA does not require knowledge that an item traveled in interstate or foreign commerce, but "does include a *mens rea* element with respect to the status of the goods as having been stolen"); *Godwin* v. *United States*, 687 F.2d 585, 588 (2d Cir. 1982) ("A violation of 18 U.S.C. § 2315 normally requires

simply the act of receiving or disposing of stolen goods of the requisite value moving in interstate commerce, coupled with knowledge that the goods are stolen."). A defendant charged with violating the NSPA may argue that he did not know a certain *fact* that made his conduct criminal, that is, that he did not know the objects in question were stolen. Schultz's "mistake of Egyptian law" defense goes to that issue. However, if a jury finds that a defendant knew all of the relevant facts, the defendant cannot then escape liability by contending that he did not know the law.

Second, the cases cited by Schultz are inapposite because each concerns conduct that normally might not be considered unlawful. The *Lizarraga* Court, ***412** for instance, emphasized that in enacting the statute of conviction, Congress "did not intend to criminally penalize innocent or negligent errors." *Lizarraga*, 541 F.2d at 828. The Supreme Court's primary concern in *Liparota* was that the statute under consideration in that case not be read in such a way as "to criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426.

In addition, the record demonstrates that Schultz's actions were not "innocent" or merely "negligent." This is not a case in which the defendant believed that he was doing something lawful, and was surprised to find that his conduct could result in criminal sanctions. To the contrary, Schultz was conspiring to *smuggle* antiquities out of Egypt and into the United States. He was defrauding (or attempting to defraud) potential buyers; the Thomas Alcock Collection story was invented by Schultz and Parry for the sole purpose of deceiving people as to the origin of the antiquities and when they had been taken out of Egypt. Schultz continued to do business in this manner even *after* his partners, Parry and Farag, had been arrested. Furthermore, Schultz and Parry demonstrated a keen awareness of the illegality of their actions by communicating in "code," forging documents, and even ex-

plicitly discussing the possibility that one or more of them might end up imprisoned.[12]

We conclude that the district court did not err in denying Schultz's request to present a defense of mistake of American law. The jury did not have to find that Schultz knew what he was doing was illegal. As long as the jury found beyond a reasonable doubt that Schultz knew the antiquities were "stolen," the jury, following the law, would have been required to convict Schultz even if it believed he had misunderstood American law.

III. *Conscious Avoidance Jury Instruction*

Prior to Schultz's trial, the government requested that the court charge the jury on the doctrine of conscious avoidance, and submitted a proposed jury instruction on that issue. The district court included an instruction on conscious avoidance in its charge, which was provided to the parties prior to the charge conference, but the court's charge did not use the language suggested by the government. Schultz did not ob-

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[12] The jury heard substantial evidence indicating that Schultz was actually aware that the NSPA had been applied to objects stolen in violation of a patrimony law. Specifically, it appears that Schultz was aware of the *McClain* decision.

In 1994, Schultz was contacted by the Turkish government. The Turkish government requested that Schultz detail the provenance of several items in his gallery that the Turkish authorities believed to be of Turkish origin. In this correspondence, the Turkish government noted that all antiquities found in Turkey are the property of the Turkish government under a patrimony law. Schultz, acting through counsel, refused to cooperate with Turkey in this inquiry, claimed that Schultz had no knowledge that any Turkish artifacts in his possession were stolen, and referred to the *McClain* case.

Schultz concedes in his appellate brief that the *McClain* decision was "well publicized." Schultz was an owner of a gallery dealing in antiquities, and was once the president of the National Association of Dealers in Ancient, Oriental and Primitive Art, suggesting that he would be aware of all significant developments in the field.

Accordingly, even if Schultz had been permitted to present this defense, it is unlikely that the jury would have credited it.

ject to the use of a conscious avoidance charge or to the specific language proposed by the district court. On appeal, Schultz contends that the district court's instruction to the jury ***413** on the doctrine of conscious avoidance was erroneous.

A. *Standard of Review*

"Because defendant did not object to the charge at trial, our review is for plain error." *United States* v. *Bala*, 236 F.3d 87, 94 (2d Cir. 2000); *see also* Fed. R. Civ. P. 56(b). The parties agree that this is the proper standard of review.

> To establish plain error, a court must find 1) an error, 2) that is plain, 3) that affects substantial rights.... If an error meets these first three requirements, the Court engages in a fourth consideration: whether or not to exercise its discretion to correct the error. The plain error should be corrected only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

United States v. *Keigue*, 318 F.3d 437, 441-42 (2d Cir. 2003) (internal citations and quotation marks omitted); *see also United States* v. *Gore*, 154 F.3d 34, 43 (2d Cir. 1998) ("A 'plain' error is an error so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object."). Schultz "bears the burden of persuasion to show that the district court's charge amounts to plain error." *United States* v. *Vasquez*, 267 F.3d 79, 87 (2d Cir. 2001).

"We do not review portions of [jury] instructions in isolation, but rather consider them in their entirety to determine whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law." *United States* v. *Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001).

B. *The District Court's Instruction*

The district court charged the jury as follows:

> [A] defendant may not purposefully remain ignorant of either the facts or the law in order to escape the

> consequences of the law. Therefore, if you find that the defendant, not by mere negligence or imprudence but as a matter of choice, consciously avoided learning what Egyptian law provided as to the ownership of Egyptian antiquities, you may [infer], if you wish, that he did so because he implicitly knew that there was a high probability that the law of Egypt invested ownership of these antiquities in the Egyptian government. You may treat such deliberate avoidance of positive knowledge as the equivalent of such knowledge, unless you find that the defendant actually believed that the antiquities were not the property of the Egyptian government.

Schultz argues, correctly, that the Second Circuit has "repeatedly emphasized that, in giving the conscious avoidance charge, the district judge should instruct the jury that knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist." *United States* v. *Feroz*, 848 F.2d 359, 360 (2d Cir. 1988) (per curiam). In Schultz's estimation, the charge given by the district court failed to convey these essential points to the jury. The government concedes that the language of the charge did not precisely mirror the language set out in prior Second Circuit cases, but contends that the charge as given was sufficiently clear and contained all of the necessary elements.

We have stated before that "no jury instruction is ever perfect." *United States* v. *Joyner*, 313 F.3d 40, 47 (2d Cir. 2002). We do not review a jury instruction to determine whether it precisely quotes language suggested by Supreme or Appellate Court precedent. Instead, we review the ***414** court's instructions to determine whether "considered as a whole, [the instructions] adequately communicated [the essential] ideas to the jury." *United States* v. *Velez-Vasquez*, 116 F.3d 58, 61 (2d Cir. 1997). "We cannot place the talismanic weight urged by [the defendant] on [the] exact wording [of a controlling opinion] and do not believe the district court needed to echo the opinion paragraph by paragraph to

convey adequately its import to the jury." *United States* v. *Schatzle*, 901 F.2d 252, 255 (2d Cir. 1990); *see also United States* v. *Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1196 (2d Cir. 1989) (finding no error in conscious avoidance charge even though it "arguably" could have led the jury to draw an "unwarranted inference"); *United States* v. *McBride*, 786 F.2d 45, 51 (2d Cir. 1986) (finding no error in conscious avoidance charge because "[t]he charge made reference to purposeful avoidance of the truth, awareness of a high probability of the fact at issue, and the absence of the defendant's actual belief in the nonexistence of the crucial fact"); *cf. DeFalco* v. *Bernas*, 244 F.3d 286, 312 n.16 (2d Cir. 2001) (finding no plain error where, "[a]lthough the language of the jury instruction [was] not ideal," the charge as a whole did not reveal "an error 'so serious and flagrant that it goes to the very integrity of the trial,' or one that 'deprived the jury of adequate legal guidance to reach a rational decision' "); *Owen* v. *Thermatool Corp.*, 155 F.3d 137, 139 (2d Cir. 1998) (finding no error in jury charge that failed to use the "more precise and more typical" phrasing set forth in precedent, because charge "adequately stated the law").

Here, the charge given by the district court adequately stated the law of conscious avoidance. The court set forth both essentials required by *Feroz*. The charge informed the jury that it could find conscious avoidance only if it found *both* (1) that Schultz avoided gaining actual knowledge "because he implicitly knew that there was a high probability that the law of Egypt invested ownership of these antiquities in the Egyptian government" *and* (2) that Schultz did not "actually believe[ ] that the antiquities were not the property of the Egyptian government." The court also gave a "good faith" instruction and reiterated, immediately after giving the conscious avoidance charge, that Schultz could be found guilty only if the jury found that he had participated in the conspiracy "knowing that it contemplated the acquisition and/or sale of antiquities *that had been stolen from Egypt*." (emphasis added).

It is true that the district court's instructions on this point could "have been more precise." *United States* v. *Bonito*, 57 F.3d 167, 174 (2d Cir. 1995). "At trial, had objection been lodged to the imprecision, the judge would have been well advised to correct it. But on appeal, and in light of the charge as a whole, we see no error so obvious and seriously prejudicial to [the defendant's] substantial rights as to constitute plain error." *Id.* The instruction as given was sufficient to inform the jury of the law of conscious avoidance, and did not constitute plain error.[13]

IV. *Admission of Testimony of Witnesses Other than Schultz Regarding Their Personal Knowledge of Law 117*

Schultz contends that the district court erred in permitting the government ***415** to elicit testimony from five witnesses—James Romano and Edna Russman, curators of the Brooklyn Museum of Art; Edmund Pillsbury, head of the Kimbell Museum; Blake Woodruff, a former employee of Schultz; and Betsy Bryan, a professor of Egyptology—regarding those witnesses' personal knowledge of Law 117. Schultz objected to this testimony in the district court; it appears that the basis for the objection was that the testimony was irrelevant. "The standard of review applicable to the evidentiary rulings of the district court is abuse of discretion." *Old Chief* v. *United States*, 519 U.S. 172, 174 n.1 (1997). "Unless a district court's determination of relevance is arbitrary or irrational, it will not be overturned." *Conway* v. *Icahn & Co.*, 16 F.3d 504, 511 (2d Cir. 1994).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence

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[13] Even if the instruction were plain error, it is not at all clear that Schultz could meet his weighty burden of establishing that the error affected the outcome of the trial, in light of the sufficient evidence introduced to permit a rational jury to infer that Schultz had *actual* knowledge of Law 117. Furthermore, permitting Schultz's conviction to stand would not seriously affect the fairness or integrity of judicial proceedings.

to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401 (2002). There is no dispute that the fact of Schultz's knowledge of Law 117 "is of consequence to the determination of the action" at hand. *Id.* The only question is whether the district court abused its discretion in determining that this testimony had "any tendency" to make that fact "more probable or less probable."

The government contends that this testimony was relevant to the question whether Schultz was aware of Law 117 because evidence that the Law was widely known among those in Schultz's field tended to make it more probable that Schultz, who had worked in the field for decades, also knew about it. Furthermore, as the government emphasizes, each of the witnesses that was asked about his or her own knowledge of Law 117 had dealt *directly* with Schultz. Schultz had offered to sell "George" and the Amenhotep sculpture to James Romano and Edmund Pillsbury, respectively, using the Thomas Alcock Collection story. Schultz provided false information about the Amenhotep sculpture to Betsy Bryan, and showed "George" to Edna Russman, telling her it came from an old collection. Blake Woodruff had been employed by Schultz at Schultz's art gallery. The district court concluded that these witnesses' testimony tended to show that "even an ignoramus in this field would know at least about patrimony laws."

Schultz relies on *United States* v. *Patrisso*, 262 F.2d 194 (2d Cir. 1958).[14] In *Patrisso*, one of the defendants, Mankes, was convicted of knowingly possessing stolen property, in part on the strength of evidence that the person who sold the goods to Mankes knew the goods were stolen. *See id.* at 195,

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[14] Schultz also relies on *Cheek* and *Liparota*, contending that because the Supreme Court never suggested that it would have been possible for the government to call witnesses to testify to their own knowledge of the facts at issue, such testimony is not permissible. This argument is without merit.

197. The Court reversed the conviction, finding that the evidence admitted regarding Mankes' co-defendants' knowledge that the property was stolen was prejudicial to Mankes. *See id.* at 198. *Patrisso* is not on point, for at least three reasons.

First, *Patrisso* is not a relevance case. The Court never held that the evidence admitted was irrelevant as to Mankes, only that it was so prejudicial to him as to be inadmissible. *See id.* at 197. Here, the defendant has argued that the evidence was not admissible because it was irrelevant, not because it was prejudicial.

***416** Second, the factual circumstances of the *Patrisso* case differed materially from those present here. In *Patrisso*, the Court noted that Mankes' behavior was not consistent with consciousness of guilt; he made no effort to conceal the stolen property. *See id.* at 198. As noted above, Schultz's behavior indicated a consciousness that his actions were illegal in some way. Mankes, however, was at least four steps removed from the actual theft: Patrisso obtained the property from the person who stole it and sold the property to Ellis; Ellis sold the property to Postrel; Postrel sold the property to Mankes. *See id.* at 196. Schultz, on the other hand, was actively involved in obtaining the antiquities, smuggling them out of Egypt, and disguising their true origins. The nature of the property at issue in *Patrisso*—television tubes—was not such that a person would naturally inquire about its source, whereas the evidence in this case established that persons considering purchasing Egyptian antiquities make extensive inquiries into the provenance of the antiquities.

Third, and most important, the type of knowledge at issue in *Patrisso* is materially different than the type of knowledge at issue here. Schultz was an acknowledged expert in the field of Egyptian antiquities, with many years of experience. It would have been natural for Schultz to know about Law 117. To the contrary, it would not have been natural for Mankes' co-defendants to tell him that the goods he was buying were stolen, and there was no other possible way for Mankes to have obtained that knowledge. Knowledge of a duly adopted, widely publicized, and vigorously enforced law

such as Law 117 is quite different from knowledge of the specific theft of a specific product in *Patrisso*. Testimony from colleagues who worked with Schultz as to their own understanding of Egyptian law "was relevant both to explain the practice of the industry in which this prosecution arose and to establish what someone with [the defendant's] extended background in the industry probably would know." *United States* v. *Leo*, 941 F.2d 181, 197 (3d Cir. 1991).

"Evidence need not be conclusive in order to be relevant." *Contemporary Mission* v. *Famous Music Corp.*, 557 F.2d 918, 927 (2d Cir. 1977). "Nonconclusive evidence should still be admitted if it makes a proposition more probable than not; factors which make evidence less than conclusive affect only weight, not admissibility." *S.E.C.* v. *Singer*, 786 F. Supp. 1158, 1166 (S.D.N.Y. 1992). Schultz's defense at trial was that he was unaware of the existence of Law 117. Evidence that those with whom Schultz dealt in the antiquities profession knew of Law 117, and particularly that Schultz's own employee knew of the Law, goes directly to the plausibility of Schultz's defense. "Determinations of relevance are entrusted to the sound discretion of the trial judge." *United States* v. *Quiroz*, 13 F.3d 505, 514 (2d Cir. 1993). Here, we see no abuse of that discretion.

CONCLUSION

We conclude that the NSPA applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law. We find the remainder of Schultz's claims to be without merit. Accordingly, the judgment of the district court is hereby affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

FREDERICK SCHULTZ,
Defendant.

01 Cr. 683 (JSR)

Jan. 3, 2002

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

The marvelous artifacts of ancient Egypt, so wondrous in their beauty and in what they teach of the advent of civilization, inevitably invite the attention, not just of scholars and aesthetes, but of tomb-robbers, smugglers, black-marketeers, and assorted thieves. Every pharaoh, it seems, has a price on his head (at least if the head is cast in stone); and if the price is right, a head-hunter will be found to sever the head from its lawful owner. So, at least, is the theory of the instant indictment, which alleges, in effect, that the defendant and one or more co-conspirators arranged to steal highly valuable ancient Egyptian artifacts—including a million-dollar head of Amenhotep III—and "fence" them in New York. This, says the indictment, makes the defendant guilty of conspiracy to violate section 2315 of Title 18, United States Code, which provides, in pertinent part, that "[w]hoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise . . . which have crossed a State or United States boundary after being stolen . . . knowing the same to have been stolen . . . [is guilty of a crime]."

The defendant has pleaded not guilty and is presumed innocent. For purposes of this pre-trial motion, however, he assumes the facts as stated in the indictment and maintains that the indictment nonetheless fails to state a conspiracy to violate section 2315 because it presupposes, wrongly in his view, that someone who conspires to smuggle ancient artifacts out of Egypt is thereby guilty of, among other things, dealing in stolen goods, by virtue of Egyptian Law 117. *See* Indictment 1-6. That law provides that, as of 1983, all Egyptian "antiquities"—that is, objects over a century old having archeological or historical importance (Law 117, Art. 1)[1]—"are considered to be public property," that is, property of the state. Law 117, Art. 6. The defendant principally argues: (i) that Law 117, despite its assertion of state ownership, is really more in the nature of a licensing and export regulation, the violation of which does not constitute theft of property in the sense covered by section 2315; (ii) that, assuming Law 117 really does work an expropriation of property by Egypt, the special kind of property thereby vested in that foreign state does not give rise to interests entitled to protection under United States law; and (iii) that even if such foreign interests might sometimes be entitled to such protection, here *****447 Congress, in enacting the Cultural Property Implementation Act of 1983, 19 U.S.C. §§ 2601 *et seq.*, chose to substitute a civil enforcement regime for criminal prosecution.

The primary problem with defendant's first argument—that Law 117 is really regulatory in nature—is the language of the law itself, which unequivocally asserts state ownership

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[1] While the defendant expends much time and energy in arguing that the definition of "antiquities" under Law 117 is too vague to afford fair notice of what is covered and what is not, none of the ancient Egyptian artifacts that is the subject of the instant indictment (and corresponding bill of particulars)—such as a pharaoh's head and two old Kingdom painted reliefs, *see* Indictment, 8(a), 8(g)—remotely raises questions of fair notice under any reasonable interpretation of that definition. That a definition may be fuzzy around the edges does not render it meaningless, or inapplicable to what it clearly covers at its core.

of all antiquities (Art. 6), requires their recording by the state (Art. 26), prohibits (with certain practical exceptions) private ownership, possession, or disposal of such antiquities (Arts. 6-8), and requires anyone finding or discovering a new antiquity to promptly notify the Antiquities Authority (Arts. 23-24), which, in the case of movable antiquities, then takes physical possession and stores the antiquities in the museums and storage facilities of the Authority (Art. 28). Thus, so far as Egyptian antiquities are concerned, Law 117 on its face vests with the state most, and perhaps all, the rights ordinarily associated with ownership of property, including title, possession, and right to transfer. This, on its face, is far more than a licensing scheme or export regulation.

To be sure, Law 117 qualifies certain aspects of state ownership where obvious practicalities so require. For example, while every newly-discovered but immovable antiquity is still deemed state owned, nonetheless "where the find is located on private property, the Authority shall decide within three months whether to remove the find, to initiate measures for expropriating the land upon which it is located, or to leave the antiquity in its place and register it in accordance with the provisions of this law." (Art. 23). Similarly, pre-1983 owners or possessors of antiquities, though now required to register their antiquities with the state if they have not already done so, may in certain circumstances maintain possession or even dispose of their antiquities, but only with permission of the Authority. *See, e.g.* Arts. 7, 8, 9, 13. These adjustments to physical and historical circumstances only serve to confirm, however, that the statute's primary purpose is to transfer ownership to the state to the extent reasonably practicable.[2]

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[2] Moreover, the conspiracy here alleged relates only to movable antiquities, and the Government has formally disclaimed any intention to argue to the jury that the defendant knew that any pre-1983 antiquities were stolen. *See* Government's Post-Hearing Memorandum In Opposition to Defendant's Motion to Dismiss the Indictment, at 3 fn.2.

Despite the plain language of Law 117, however, defendant argues that, in practice, even those antiquities discovered after 1983 have been left in the hands of their discoverers or other private transferees and that the law in operation really works more like a licensing or export regulation than like a transfer of property. But when, in response to these and other defense assertions, the Court convened an evidentiary hearing, pursuant to Rule 26.1 of the Federal Rules of Criminal Procedure, the defendant was unable to adduce any material, let alone persuasive evidence to support this contention. The most he could offer in this respect was the opinion of Professor Abou El Fadl, a professor of Islamic and Middle Eastern law at UCLA Law School, to the effect that nothing in Law 117 definitively prevents the Antiquities Authority from leaving physical possession of even an antiquity discovered after 1983 in the hands of a private finder, so long as the private finder promptly notifies the Authority of his find. *See* transcript of hearing of November 20, 2001 ("Tr."), at A20.[3]

***448** In response to this purely hypothetical opinion, the Government presented, among much else, the testimony of Dr. Gaballa Ali Gaballa, Secretary General to the Supreme Council of Antiquities, that in fact the state takes immediate physical custody of newly discovered antiquities, sometimes by the tens of thousands, tr. A77-79. Another Government witness, General Ali Sobky, Director of Criminal Investigations for the Antiquities Police (which employs more than 400 police officers), testified that his department regularly investigates and prosecutes dozens of serious violations of Law 117, of which relatively few are for smuggling and most are for trafficking within Egypt (including unlawfully possessing

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[3] The transcript pages of the first portion of the November 20 hearing, taken by the Court Reporters, are denoted "A" followed by the page number. The transcript pages of the second portion of the November 20 hearing, originally taped and then transcribed by the Transcription Service, are denoted "B" followed by the page number.

and disposing of state-owned antiquities), tr. B51-55.[4] General Sobky also testified that even in the case where someone is acquitted of stealing a newly discovered antiquity, the antiquity is confiscated by the state as the lawful owner, tr. B69.

It is clear, therefore, that Law 117, far from being a disguised licensing scheme or export regulation, is precisely what it purports to be: a transfer of ownership of Egyptian antiquities to the state, effective 1983.

As for defendant's second argument--to the effect that American law does not, or should not, recognize the kind of "special" property interest created by "patrimony" laws like Law 117, *see United States v. McClain*, 545 F.2d 988, 994 (5th Cir. 1977) (Wisdom, J.) (rejecting such an argument)--it should first be noted that section 2315, which expressly refers to foreign commerce, has consistently "been applied to thefts in foreign countries and subsequent transportation into the United States," *McClain*, 545 F.2d at 994 (citing cases): an implicit recognition of the interest of the United States in deterring its residents from dealing in the spoils of foreign thefts. In effectuating this policy, why should it make any difference that a foreign nation, in order to safeguard its pre-

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[4] The defendant objected to certain of this testimony on hearsay and "due process" grounds, as well as on the ground that the underlying Egyptian documents that General Ali El Sobky summarized were not made available to the defendant. However, a "court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Rule 26.1, Fed. R. Crim. P. At the November 20 hearing, the Court reserved on defendant's objections until the defendant had been provided with the underlying documents and had had a further opportunity to brief his objections. This having been done (*see, e.g.*, Government's letter of December 18, 2001 and attachments thereto), the Court hereby determines that the objected-to evidence shall be received. It may also be noted that, even if the Court were to exclude this evidence, that would in no way change the result, since the provisions of Law 117 transferring ownership and right to possession to the state (which, contrary to defendant's argument, the Court finds to be unambiguous) must be presumed to be in force unless the defendant comes forward with at least some material evidence to the contrary—which, as noted, he has wholly failed to do.

cious cultural heritage, has chosen to assume ownership of those objects in its domain that have historical or archeological importance, rather than leaving them in private hands?[5] If an American conspired to steal the Liberty Bell and sell it to a foreign collector of artifacts, there is *449 no question he could be prosecuted under section 2315. *Mutatis mutandis*, the same is true when, as here alleged, a United States resident conspires to steal Egypt's antiquities.

To be sure, even if the Government proves the defendant knew he was importing antiquities that were smuggled out of Egypt--an act that may not be inherently violative of United States law and policy, *see McClain*, 545 F.2d at 996—there may still be a jury question as to whether he knew he was dealing in stolen goods, an essential element of a section 2315 violation. But the indictment alleges he possessed such knowledge, and the Government asserts that it will prove, *inter alia*, that the defendant knew that at least two of the items he conspired to import had been stolen from the Antiquities Police. This is more than sufficient for purposes of the present motion.

Finally, as for defendant's argument that the Cultural Property Implementation Act of 1983, a civil customs law, somehow supersedes section 2315 when applied to the same subject matter, suffice to say that there is nothing in the language or the history of the Cultural Property Implementation Act to support this unlikely result. On the contrary, the Senate, in reporting out the Cultural Property Implementation Act, expressly stated that the Act "neither pre-empts

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[5] Egyptian law, like United States law, requires just compensation for takings, tr. A57. Accordingly, Law 117 expressly provides for full compensation to those who owned Egyptian antiquities prior to the state's assumption of ownership in 1983 or, even thereafter, to those whose land the state chooses to take by eminent domain in order to preserve the immovable antiquities upon it. *See, e.g.*, Arts. 7, 13, 14, 16, 25. Furthermore, even those persons who discover antiquities after 1983 and are therefore on notice of the state's ownership qualify, in the discretion of the Antiquities Authority, for financial rewards for their efforts. *See* Arts. 23, 24.

state law in any way, nor modifies any Federal or State remedies . . . ." S. Rep. No. 97-564, at 25 (2d Sess. 1982).

Nor, indeed, is there any inconsistency between the application of the Cultural Property Implementation Act and the application of section 2315 to the "cultural property" involved in this case. *See United States v. Stephenson*, 895 F.2d 867, 872 (2d Cir. 1990). The Cultural Property Implementation Act, rather than banning the importation of all cultural property exported in violation of foreign law, takes a more nuanced and complicated approach to when and under what circumstances such property can be imported into the United States; but this is because the Act is chiefly concerned with balancing foreign and domestic import and export laws and policies, not with deterring theft. Section 2315, by contrast, only applies in cases of intentional theft and knowing disposal of stolen goods, a situation in which even the primary academic proponent of the Cultural Property Implementation Act has stated that criminal prosecution is appropriate. *See* Paul M. Bator, *An Essay on the International Trade in Art*, 34 Stan. L.Rev. 275, 353 (1982).

While defendant raises still other arguments in support of his motion to dismiss the indictment, the Court finds them sufficiently meritless as not to warrant discussion here.[6]

Accordingly, the Court, confirming its Order of December 27, 2001, hereby denies defendant's motion to dismiss the indictment.

SO ORDERED.

/s/
JED. S. RAKOFF, U.S.D.J.

Dated: New York, New York
January 3, 2002

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[6] For example, the fact that an Egyptian court, in connection with a criminal prosecution of certain of defendant's co-conspirators, did not name the defendant as a co-conspirator, in no way constitutes, as defendant here argues, a judicial determination of defendant's innocence binding on this Court. Defendant, indeed, was not even a party to the other proceeding.

Supreme Court, U.S.
FILED
DEC 22 2003
OFFICE OF THE CLERK

No. 03-592

In the Supreme Court of the United States

FREDERICK SCHULTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The National Stolen Property Act prohibits the knowing receipt or possession of property that has "crossed a State or United States boundary after being stolen, unlawfully converted, or taken." 18 U.S.C. 2315. The question presented is as follows:

Whether antiquities that were removed from Egypt in violation of that country's national patrimony law, which declares such objects to be the property of the Republic of Egypt, are "stolen" within the meaning of Section 2315.

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In the Supreme Court of the United States

No. 03-592

FREDERICK SCHULTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 333 F.3d 393. The opinion of the district court (Pet. App. 39a-45a) denying petitioner's motion to dismiss the indictment is reported at 178 F. Supp. 2d 445.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2003. On September 16, 2003, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 23, 2003. The petition for a writ of certiorari was filed on October 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to receive stolen property that had been transported in interstate or foreign commerce, in violation of 18 U.S.C. 371 and 2315. He was sentenced to 33 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-38a.

1. The National Stolen Property Act (NSPA) establishes criminal penalties for any person who "receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise * * * which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken." 18 U.S.C. 2315.

2. The gravamen of the instant prosecution was that petitioner had conspired to receive property that had been "stolen" in violation of Egypt's Law 117, entitled *The Law on the Protection of Antiquities*. See Pet. App. 8a. As the court of appeals explained,

> [i]n order to preserve its cultural heritage, Egypt in 1983 enacted a "patrimony law" which declares all antiquities discovered after the enactment of the statute to be the property of the Egyptian government. The law provides for all antiquities privately owned prior to 1983 to be registered and recorded, and prohibits the removal of registered items from Egypt. The law makes private ownership or possession of antiquities found after 1983 illegal.

Id. at 7a. Although the instant prosecution involves unlawful removal of antiquities from Egypt, the Secretary General of Egypt's Supreme Council of Antiquities testified at a pre-trial hearing in this case (see

id. at 10a) that "he was aware of cases in which Law 117 had been applied to persons whose violations of the law took place entirely inside Egypt." *Id.* at 11a.[1]

3. In 1991, petitioner met Jonathan Tokeley Parry, a British national. Parry showed petitioner a photograph of an ancient sculpture of the head of Pharaoh

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[1] Law 117 provides in pertinent part as follows:

Article 1

An "Antiquity" is any movable or immovable property that is a product of any of the various civilizations or any of the arts, sciences, humanities and religions of the successive historical periods extending from prehistoric times down to a point one hundred years before the present, so long as it has either a value or importance archaeologically or historically that symbolizes one of the various civilizations that have been established in the land of Egypt or that has a historical relation to it, as well as human and animal remains from any such period.

* * *

Article 6

All antiquities are considered to be public property—except for charitable and religious endowments. * * * It is impermissible to own, possess or dispose of antiquities except pursuant to the conditions set forth in this law and its implementing regulations.

Article 7

As of [1983], it is prohibited to trade in antiquities.

* * *

Article 8

With the exception of antiquities whose ownership or possession was already established [in 1983] or is established pursuant to [this law's] provisions, the possession of antiquities shall be prohibited as from [1983].

Pet. App. 8a-9a.

Amenhotep III. Parry explained that he had obtained the sculpture in Egypt earlier that year and had smuggled it out of Egypt. Petitioner offered Parry a substantial fee in order to serve as the agent to sell the Amenhotep sculpture, and Parry accepted that offer. The two men then created a false provenance for the sculpture, claiming that it had been brought from Egypt in the 1920s and had been maintained since that time in an English private collection, which they dubbed the "Thomas Alcock Collection." With petitioner's knowledge, Parry prepared fake labels for the sculpture, which were designed to look as if they had been printed in the 1920s. Parry also restored the sculpture using a method that was popular during that period. Pet. App. 2a-3a.

Acting as Parry's agent, petitioner attempted unsuccessfully to sell the sculpture, and he eventually purchased it from Parry for $800,000. In 1992, petitioner sold the sculpture to a private collector for $1.2 million. In June 1995, Robin Symes, who then owned the sculpture, asked petitioner to provide him with more details about the sculpture's origin, because Symes had learned that the Egyptian government was pursuing the object. Petitioner inquired about the Egyptian pursuit of the object, but he did not provide Symes with any further information about the piece. Pet. App. 3a.

Using similar methods, Parry and petitioner smuggled additional antiquities out of Egypt for the purpose of offering them for sale in the United States. Parry's testimony at petitioner's trial identified six items or groups of items, in addition to the Amenhotep sculpture, that he and petitioner had attempted to remove from Egypt and sell in New York, using a false provenance. In 1992, Parry and his Egyptian middleman, Ali Farag, paid the debts of certain corrupt Egyptian

police officers, in return for which the officers allowed Parry to remove antiquities that were in police possession. Parry sent three such items to petitioner and told petitioner how he had obtained them. Also in 1992, Parry brought a limestone sculpture of a striding figure to petitioner in New York. In a letter to petitioner, Parry described the means he had used to remove the object from Egypt. As he had with other items, Parry disguised the figure in plastic and plaster in order to take it out of Egypt. In trying to sell that sculpture, petitioner once again created a fictional provenance. Pet. App. 3a-5a.

In 1994, Parry was arrested in Great Britain. He continued to correspond extensively with petitioner, both about his prosecution and about plans for future acquisitions. In 1995 and 1996, Parry and petitioner attempted to obtain limestone stelae, or inscribed slabs, that had recently been discovered in Egypt. Petitioner sent money to purchase the stelae, but neither he nor Parry was able to obtain them. Pet. App. 5a-6a.

Petitioner and Parry communicated regularly by letter. Those letters reflect an awareness that the activities described above entailed a great legal risk. Sometimes petitioner and Parry used "veiled terms" in their letters, as well as code and languages other than English. Pet. App. 6a, 30a-31a.

4. Petitioner was charged with conspiring to receive stolen property that had been transported in interstate or foreign commerce, in violation of 18 U.S.C. 371 and 2315. Pet. App. 1a-2a, 39a. Before trial, petitioner moved to dismiss the indictment, arguing that the items he was charged with conspiring to receive were not "stolen" within the meaning of Section 2315. The district court denied the motion to dismiss. *Id.* at 39a-45a.

Petitioner contended that Egypt's Law 117 is properly regarded as a licensing and export regulation, violation of which does not render unlawfully-removed property "stolen" within the meaning of the NSPA. See Pet. App. 40a. The district court rejected that characterization of Law 117, explaining that "so far as Egyptian antiquities are concerned, Law 117 on its face vests with the state most, and perhaps all, the rights ordinarily associated with ownership of property, including title, possession, and right to transfer. This, on its face, is far more than a licensing scheme or export regulation." *Id.* at 41a. The court also found that the "interest of the United States in deterring its residents from dealing in the spoils of foreign thefts," which generally underlies the application of the NSPA to property stolen in violation of foreign law, is fully applicable when "a foreign nation, in order to safeguard its precious cultural heritage, has chosen to assume ownership of those objects in its domain that have historical or archeological importance." *Id.* at 43a-44a. Finally, the court rejected petitioner's contention that application of the NSPA to the antiquities at issue here is superseded by the Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. 2601 *et seq.* Pet. App. 44a-45a. The court explained that the CPIA was not intended to preempt or modify other applicable laws, and that there was in any event no inconsistency between the CPIA and NSPA as applied to this case. *Ibid.* Petitioner was subsequently found guilty by a jury of the charged offense. See *id.* at 1a.

5. The court of appeals affirmed. Pet. App. 1a-38a.

a. The court of appeals rejected petitioner's contention that Law 117 is an export restriction rather than a "'real' ownership law." Pet. App. 12a. The court found that characterization to be inconsistent both with the

plain language of Law 117 and with the testimony of Egyptian officials regarding the law's implementation. *Ibid.* The court explained that "[t]he Law's provisions are directed at activities within Egypt as well as export of antiquities out of Egypt. Law 117 makes it clear that the Egyptian government claims ownership of all antiquities found in Egypt after 1983, and the government's active enforcement of its ownership rights confirms the intent of the Law." *Id.* at 13a; see pp. 2-3, *supra* (noting evidence that Law 117 has been applied to activities occurring wholly within Egypt).

b. The court of appeals also rejected petitioner's argument that the type of ownership interest asserted by Egypt through its national patrimony law "should not be recognized by the United States for purposes of prosecution under the NSPA." Pet. App. 13a. Relying in part on *United States* v. *McClain*, 545 F.2d 988, 996-997, 1001-1002 (5th Cir. 1977), and *United States* v. *Hollinshead*, 495 F.2d 1154, 1156 (9th Cir. 1974), the court found that property taken from Egypt in violation of Law 117 is "stolen" within the meaning of the NSPA. See Pet. App. 13a-22a.

c. The court of appeals held that the CPIA neither supersedes the NSPA with respect to the conduct involved here, nor reflects any congressional understanding that such activities lie outside the NSPA's coverage. Pet. App. 23a-25a. The court acknowledged that there may be "cases in which a person will be violating both the CPIA and the NSPA when he imports an object into the United States." *Id.* at 25a. The court concluded, however, that "it is not inappropriate for the same conduct to result in a person being subject to both civil penalties and criminal prosecution, and the potential overlap between the CPIA and the NSPA is no reason to limit the reach of the NSPA." *Ibid.*

d. Relying on this Court's decision in *United States* v. *Turley*, 352 U.S. 407 (1957), the court of appeals rejected petitioner's contention that "interpreting the NSPA to apply to items that are 'stolen' in the sense that they are possessed by a defendant in violation of a foreign patrimony law would be in derogation of the common law." Pet. App. 26a. In *Turley*, this Court held that the word "'stolen' (or 'stealing') has no accepted common-law meaning," and it construed the term "stolen" (within a predecessor federal stolen-property statute) to encompass "all felonious takings * * * regardless of whether or not the theft constitutes common-law larceny." 352 U.S. at 411, 417 (quoted at Pet. App. 26a). Based on *Turley*, the court of appeals concluded that the NSPA "covers a broader class of crimes than those contemplated by the common law." Pet. App. 26a.

e. The court of appeals found it unlikely that application of the NSPA to petitioner's conduct would impede the lawful importation of antiquities into the United States. See Pet. App. 27a. The court acknowledged that its decision "does assuredly create a barrier to the importation of cultural property owned by a foreign government." *Ibid.* The court saw no justification, however, for treating "property stolen from a foreign sovereign" differently from "property stolen from a foreign museum or private home." *Ibid.* The court also observed that "[t]he *mens rea* requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods." *Ibid.*

ARGUMENT

The court of appeals' rejection of petitioner's interpretation of the National Stolen Property Act is correct and (as petitioner concedes, see Pet. 9) does not conflict

with any decision of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 8) that "[t]he court of appeals' decision effects an avulsive change in the law under the NSPA." That claim is without basis. To the contrary, the Second Circuit's decision in this case is consistent with the only appellate precedents addressing the application of the NSPA to property removed from a foreign country in violation of a national patrimony law.

In *United States* v. *Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974), the court agreed with the government that an object is "stolen" within the meaning of the NSPA if it was taken from its country of origin in violation of a national patrimony law. *Hollinshead* involved a statute enacted by the Republic of Guatemala providing that artifacts found in Mayan ruins were the property of the Republic. *Id.* at 1155-1156. Three years later, the Fifth Circuit held that the NSPA was validly applied to the theft and subsequent transportation to this country of pre-Columbian artifacts that were owned by the Republic of Mexico pursuant to a patrimony law similar to that involved in this case. See *United States* v. *McClain*, 545 F.2d 988, 996, 1000-1001 (5th Cir. 1977); see also *United States* v. *Long Cove Seafood, Inc.*, 582 F.2d 159, 163, 165 (2d Cir. 1978) (citing *McClain* with approval). Although *McClain* has been the subject of some scholarly criticism (see Pet. 16), petitioner cites no judicial decision that has rejected or criticized the Fifth Circuit's holding that property removed from a foreign country in violation of a

national patrimony law is "stolen" within the meaning of the NSPA.[2]

Petitioner suggests that, after the Fifth Circuit's subsequent decision in *United States* v. *McClain*, 593 F.2d 658, cert. denied, 444 U.S. 918 (1979), "the government's theory of prosecution in *McClain* had seemingly died a quiet death." Pet. 16 n.13. In 1985, however, a Senate subcommittee held hearings on proposed legislation that would have amended the NSPA to overturn the decision in *McClain*. See *Relating to Stolen Archeological Property: Hearing on S. 605 Before the Subcomm. on Criminal Law of the Senate Comm. of the Judiciary*, 99th Cong., 1st Sess. (1985) (*1985 Senate Hearing*). Representatives of the Justice and State Departments and of the Customs Service testified in opposition to that legislative proposal. See *id.* at 27-30, 41-44, 57-60. The Justice Department representative explained, *inter alia*, that "[t]he courts of the United States have generally recognized the sovereign right of a country to declare itself the owner of [archeological] property"; that the Department "believe[d] that the *McClain* decision reflects the proper interpretation of the NSPA"; and that "the deterrent effect of *McClain* is consistent with the U.S. policy of protecting the archeological and ethnological property of foreign nations." *Id.* at 28. That witness testified that enactment of the proposed legislation "could effectively create a legal marketplace within the United States for the fruits of foreign grave robbery." *Id.* at 29-30. Congress was thus clearly placed on notice both of the existence of the *McClain* decision and of the Executive Branch's

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[2] Other scholarly commentary has embraced *McClain*'s analysis and the application of the NSPA in this setting. See Gov't C.A. Br. 37-38 n.*.

views about the decision's practical significance, and Congress thereafter declined to enact the proposed statutory amendment.

2. Petitioner contends (Pet. 8-12) that the court of appeals' decision places good-faith purchasers of antiquities at risk of criminal prosecution if the relevant objects are subsequently found to have been removed from a foreign country in violation of that nation's patrimony law. That concern is considerably overstated. The NSPA's criminal prohibition applies only when a person receives or possesses stolen property "knowing the same to have been stolen, unlawfully converted, or taken." 18 U.S.C. 2315. As the court of appeals recognized, "[t]he *mens rea* requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods." Pet. App. 27a.

As petitioner correctly observes (Pet. 10), a person who initially purchases antiquities in good faith will be subject, under the court of appeals' decision, to potential criminal liability if he retains the objects *after* learning that they were removed from Egypt in violation of Law 117. But the risk of criminal prosecution for continued possession of stolen property that was initially acquired in good faith is not unique to the context of national patrimony laws, and it would not be eliminated by reversal of the court of appeals' judgment in this case. The NSPA unambiguously prohibits the "possess[ion]" of stolen property by a person who "know[s] the same to have been stolen." 18 U.S.C. 2315. Whenever a dealer or museum purchases antiquities or other property, it assumes the risk that the items will later be shown to have been stolen—in which case the buyer must relinquish possession or face potential criminal liability. That risk is inherent in the principle that "[e]ven a *bona fide* purchaser does not

obtain good title to a 'stolen' art object" (Pet. 12 n.9), and it will continue to exist regardless of the precise construction given to the word "stolen" in the NSPA. Petitioner offers no basis for concluding that it will be more difficult for a prospective buyer to determine whether a particular object was removed from Egypt before or after 1983 (see Pet. 10) than to determine whether the item was previously taken in violation of some other domestic or foreign law.[3]

Certainly there is no reason to believe that petitioner himself was subjected to any unfair surprise. Parry smuggled the antiquities out of Egypt by covering them with substances to make them appear to be copies, and he and petitioner fabricated a non-existent English collection in order to provide an ostensibly legitimate provenance for the artifacts. See Pet. App. 3a-5a. Parry also informed petitioner that he had obtained other items from corrupt Egyptian police officers. *Id.* at 5a. As the court of appeals observed, moreover, "[petitioner] and Parry demonstrated a keen awareness of the illegality of their actions by communicating in 'code,' forging documents, and even explicitly discussing the possibility that one or more of them might end up imprisoned." *Id.* at 30a-31a. Indeed, the jury at petitioner's trial "heard substantial evidence indicating that [petitioner] was actually aware that the

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[3] Art dealers and museums are potential victims of theft as well as potential defendants in NSPA prosecutions. Property that is unlawfully taken from a museum or dealer could be transferred to a third party who initially purchases the items in good faith but subsequently discovers that the objects are stolen. The NSPA's criminal ban on continued possession of property under those circumstances serves the interests of the victimized museum or dealer by providing additional incentives for return of the property to its rightful owner.

NSPA had been applied to objects stolen in violation of a patrimony law. Specifically, it appears that [petitioner] was aware of the *McClain* decision." *Id.* at 31a n.12.

3. Petitioner contends (Pet. 12-13) that the NSPA should not be construed to protect the Egyptian government's property interests established by Law 117 because the nationalization (without compensation) of property that Law 117 accomplishes is inconsistent with our own constitutional scheme. But while petitioner characterizes the property rights established by Law 117 as "exotic" (Pet. 13), nationalization of property by foreign governments is scarcely unique to Egypt (or to the preservation of antiquities). Petitioner does not appear to dispute the NSPA's general applicability to property that is "stolen" in violation of foreign law and then transported to the United States. In acting to protect property rights conferred by foreign law, Congress must be presumed to have understood that the scope and nature of such rights would vary widely, and to have intended (at least absent extraordinary circumstances) that United States courts in applying the NSPA would take the governing foreign law as they found it.[4] Petitioner cites no decision of any

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[4] In various contexts, federal courts routinely look to foreign law to determine underlying property interests and other issues relevant to the disposition of criminal or civil cases. See, *e.g.*, *United States* v. *Pierce*, 224 F.3d 158, 165-166 (2d Cir. 2000) (examining Canadian law to determine whether a Canadian had a right to be paid money in a prosecution concerning a scheme to defraud the Canadian government of tax revenues); *United States* v. *Mitchell*, 985 F.2d 1275, 1282-1283 (4th Cir. 1993) (looking to Pakistani law to determine whether defendant could be prosecuted under the Lacey Act for receiving wild animal trophies). Federal Rule of Criminal Procedure 26.1 specifically contemplates the

court that has refused to apply the NSPA to property taken in violation of foreign law based on the perceived repugnance of that law to our own legal system.[5]

For much the same reason, there is no merit to petitioner's argument (see Pet. 15-20) that the court of appeals' decision will disrupt the sale and acquisition of art works by making the legality of private conduct within the United States dependent on arcane rules of foreign law. Assuming (as petitioner appears to concede) that the NSPA generally applies to property taken in violation of foreign law, there is no reason to suppose that the construction of national patrimony laws will pose unique interpretive difficulties. Indeed, even when the governing law is altogether clear, uncertainty about the relevant facts may prevent a prospective buyer of art from determining with assurance whether a particular item is "stolen" within the meaning of the NSPA. See Pet. 9 ("The reality of the art market is that provenances are often lost to history.").

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prospect that questions of foreign law may arise in federal criminal prosecutions, and it provides that "in deciding such issues a court may consider any relevant material or source."

[5] Petitioner also contends that "enactments like Egypt's Law 117 are not properly understood as ownership laws" because "[t]heir purpose is to keep cultural objects within the national territory even if the government does not make any effort to reduce those objects to possession." Pet. 14 (internal quotation marks omitted). Whatever may be true of other national patrimony laws, the courts below considered and correctly rejected that characterization of Law 117. See Pet. App. 12a-13a, 19a-21a, 23a, 40a-43a. The court of appeals relied on, *inter alia*, evidence that "the Egyptian government actively pursues any person found to have obtained an antiquity and takes immediate possession of all antiquities of which it becomes aware," *id.* at 19a, and that Law 117 "is used in Egypt to prosecute people for trafficking in antiquities *within Egypt's borders*," *id.* at 23a.

In drafting the NSPA, Congress protected potential defendants against unfair surprise, not by arbitrarily distinguishing between different types of property laws, but by requiring proof that the defendant knew the property to be stolen. See p. 11, *supra*.

4. Petitioner argues (Pet. 20-27) that the court of appeals' ruling is inconsistent with the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, and with the CPIA, which implemented the Convention. That claim lacks merit.

a. Nothing in the text or history of the CPIA suggests that Congress intended that statute to supersede the NSPA or render it inapplicable to conduct that the NSPA had previously forbidden. To the contrary, as the court of appeals recognized (Pet. App. 24a), the Senate Report accompanying the CPIA states that the CPIA "affects neither existing remedies available in State or Federal courts nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce (*e.g.*, National Stolen Property Act, Title 18, U.S.C. Sections 2314-15)." S. Rep. No. 564, 97th Cong., 2d Sess. 33 (1982). Nor does petitioner suggest that any "positive repugnancy" (*United States* v. *Batchelder*, 442 U.S. 114, 122 (1979) (quoting *United States* v. *Borden Co.*, 308 U.S. 188, 199 (1939)) exists between the two statutes in their application to the conduct at issue here.

b. Petitioner does not appear to contend that the CPIA rendered the NSPA inapplicable to conduct that the NSPA had previously covered. See Pet. 25. Rather, petitioner argues that the CPIA reflects "an understanding of property ownership that is inconsistent with" a decision to treat artifacts that were

removed from Egypt in violation of that country's national patrimony law as "stolen" within the meaning of the NSPA. Pet. 25. Even if the Congress that enacted the CPIA in 1972 could be shown to have believed that the NSPA would not apply to conduct like petitioner's, that conception of the NSPA's coverage would not be dispositive, since "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie* v. *United States*, 519 U.S. 79, 90 (1996). In any event, the CPIA does not imply any particular answer to the question whether the NSPA prohibits conduct like that in which petitioner engaged.

As the court of appeals observed (see Pet. App. 25a), the CPIA is an import law that contains no criminal provisions. Though the CPIA may sometimes apply to objects that have been designated by a national patrimony law to be the property of a foreign government, the CPIA does not specifically refer to such laws, and the applicability of the CPIA's import restrictions does not turn on the presence or absence of a claim of ownership by a foreign state. Rather, once those import restrictions are triggered (see 19 U.S.C. 2602-2604), they more broadly prohibit the importation into the United States of any "designated archaeological or ethnological material that is exported" from a nation that is a party to the Convention "unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party." 19 U.S.C. 2606(a). That ban on the importation of culturally significant items that have been exported from a party to the Convention in violation of that nation's *export* laws reflects no congressional judgment about the proper

treatment of persons who knowingly deal in antiquities over which a foreign government asserts *ownership*.[6]

The CPIA's only prohibition on importation of "stolen" property is contained in 19 U.S.C. 2607, which forbids the importation into the United States of cultural property that has been stolen from "a museum or religious or secular public monument or similar institution in any State Party." As the court of appeals recognized, Section 2607's narrow focus on a particular class of stolen artifacts does not suggest that Congress viewed the NSPA as inapplicable to other stolen antiquities. "If, for instance, an artifact covered by the

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[6] Some proponents of the 1985 legislative proposal that would have overturned the *McClain* decision (see pp. 10-11, *supra*) defended the proposal as a means of furthering the principles underlying the UNESCO Convention and the CPIA. The State Department witness who testified in opposition to the bill disputed that rationale, explaining that

> [w]hile the present bill has been presented as having its foundation in the [CPIA], the implementing legislation for the [UNESCO] Convention, the Department believes that its enactment would signal a significant departure from principles upon which that convention was based. Neither the convention nor the Act was intended to limit pre-existing domestic remedies for the recovery of stolen cultural property. Countries having archeological and ethnological materials in great demand in the international art market would view the legislative override of the *McClain* case as depriving them of meaningful cooperation in the recovery of the cultural property which they have determined to be most important to their heritage; namely, that which has been declared to be the property of the nation.

1985 Senate Hearing 41. That witness further testified that "the [State] Department does not agree that the [CPIA] established any national policy regarding the importation of archeological and ethnological materials which requires the override of the *McClain* decision." *Id.* at 42.

CPIA were stolen from a private home in a signatory nation and imported into the United States, [Section 2607] would not be violated, but surely the thief could be prosecuted for transporting stolen goods in violation of the NSPA." Pet. App. 25a.

c. Petitioner's reliance (Pet. 25-27) on *Dowling* v. *United States*, 473 U.S. 207 (1985), is misplaced. In *Dowling*, this Court held that the NSPA did not reach interstate transportation of "bootleg" phonorecords—*i.e.*, phonorecords of unauthorized performances of copyrighted musical compositions. *Id.* at 214-229. The Court observed that earlier prosecutions under the NSPA had involved "physical goods, wares, or merchandise that have themselves been stolen, converted or taken by fraud," *id.* at 216 (brackets and internal quotation marks omitted), and it found that "interference with copyright does not easily equate with theft, conversion, or fraud," *id.* at 217. As an additional factor supporting its decision, the Court noted that Congress has "chiefly relied on an array of civil remedies to provide copyright holders protection against infringement," and that "in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution." *Id.* at 221.

The CPIA is not remotely comparable to the body of copyright infringement legislation considered in *Dowling*. The CPIA cannot plausibly be regarded as a comprehensive effort to define the proper treatment of persons who knowingly deal in antiquities stolen abroad: the statute contains no criminal provisions, and it addresses only a narrow category of stolen property. See p. 17, *supra*. In *Dowling*, moreover, the inference drawn by the Court from the extensive body of copyright protection law reinforced what the Court in any event regarded as the most natural reading of the

NSPA's text. The property at issue here, by contrast —artifacts removed from Egypt in violation of Egyptian law, and in derogation of the Egyptian government's declaration of ownership—were "stolen" within any ordinary understanding of that term. And unlike the situation in *Dowling*, where the Court found no evidence of congressional awareness that the NSPA had been applied to bootleg phonorecords, see 473 U.S. at 225 n.18, Congress considered and declined to enact a proposed statutory amendment that would have limited the scope of the NSPA in the manner that petitioner now advocates. See pp. 10-11, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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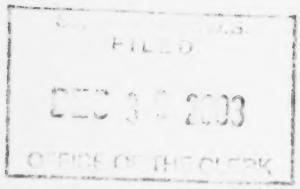
DECEMBER 2003



(3)

No. 03-592

IN THE

Supreme Court of the United States

FREDERICK SCHULTZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Under the court of appeals' construction of the National Stolen Property Act (NSPA), 18 U.S.C. § 2315, each of the following persons will be guilty of the federal crime of possessing stolen property:

- an individual whose property is ordered confiscated by an authoritarian foreign state, and who attempts to safeguard her family heirlooms by bringing them to the United States (as well as any American dealer who purchased them);[1]
- an American tourist who purchases a Maori carving from a reputable shop in London and who later reads in the newspaper that New Zealand claims ownership of all such artifacts, but who has no inkling that he might be prosecuted under U.S. law for retaining the carving and no idea how the object might be returned to the New Zealand government;[2] and
- anyone who purchased any of the Egyptian antiquities at issue in this case from petitioner at his New York gallery and who later learned about his con-

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[1] The government essentially acknowledges this point. *See* Br. in Opp. 13 ("But while petitioner characterizes the property rights established by Law 117 as 'exotic,' nationalization of property by foreign governments is scarcely unique to Egypt (or to the preservation of antiquities." (citation omitted)). Recognizing the outlandishness of this result, the government attempts to modify its argument that all foreign governmental assertions of property interests must be given effect under the NSPA with the qualifier "at least absent extraordinary circumstances." *Id.* The government gives no guidance, however, as to which kinds of foreign laws (including confiscations of private property) should be considered "extraordinary" and which should not.

[2] *See* Br. in Opp. 11 ("As petitioner correctly observes, a person who initially purchases antiquities in good faith will be subject, under the court of appeals' decision, to potential criminal liability if he retains the objects *after* learning that they were removed from Egypt in violation of Law 117." (citation omitted)); Pet. App. 27a-31a (court of appeals' rejection of "mistake of American law" defense).

viction, even if the buyer had no idea at the time of purchase that Egypt had a cultural patrimony law.[3]

As these results make clear, there is something seriously amiss about the court of appeals' decision, for it brings within the NSPA conduct that most Americans would never imagine could be punishable as a crime. Our own legal system would not treat a private individual's possession or disposition of property that he legitimately obtained by discovery or purchase as "stealing" merely because the government had declared itself the owner of that property, without offering compensation. Such broad governmental assertions of ownership over property held in private hands, without compensation, are contrary to our Constitution and common law. And Congress should not be presumed to have intended the NSPA to depart so drastically from deeply held assumptions in our legal system, for "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." *United States* v. *Bailey*, 444 U.S. 394, 415 n.11 (1980).

Notably, the government does not take issue with our point that Egypt's Law 117 and similar sweeping cultural patrimony laws *are* inconsistent with our legal system.[4] Rather, the government's response is that individuals and federal courts must accept foreign law—including foreign governments' expropriation of private property—"as they found it." Br. in Opp. 13. But petitioner was not prosecuted for violating foreign law; he was prosecuted for violating

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[3] *See* Br. in Opp. 4 (noting Robin Symes' purchase of sculpture from petitioner); *supra* note 2.

[4] Nor does the government even attempt to defend the court of appeals' reliance on *United States* v. *Turley*, 352 U.S. 407 (1957), which held only that the deceptive and wrongful taking of property that would be protected under any legal system may be considered "stealing" under the NSPA, not—as the court of appeals seemed to think—that any foreign government's assertion of a property interest in an object, no matter how remote from our own legal system, can support prosecution under the NSPA.

American law. The question here is not whether Egypt might bring some legal action against petitioner in its own courts based on its own law, but whether our federal criminal law should uncritically accept any foreign government's assertion of a property interest, no matter how contrary it is to our law—at least absent clear direction from Congress that our law should defer so completely to foreign law. Thus, the government's reliance on *United States* v. *Mitchell*, 985 F.2d 1275 (4th Cir. 1993) (*see* Br. in Opp. 13 n.4), is particularly unfounded. *Mitchell* involved a prosecution under the Lacey Act, 16 U.S.C. § 3372, which expressly makes it unlawful to import wildlife taken "in violation of any foreign law." The Lacey Act shows that Congress knows how to incorporate foreign law by reference when it intends that any violation of foreign law shall also be deemed a violation of American law. The NSPA contains no similar incorporation of foreign law by reference.[5]

2. The court of appeals' decision makes the content of federal criminal law turn on elusive distinctions in foreign cultural patrimony laws, which may be difficult to understand or even find. Absent an express indication by Con-

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[5] Nor does *United States* v. *Pierce*, 224 F.3d 158 (2d Cir. 2000), support the government's argument that any foreign law asserting governmental ownership over property must be given controlling effect under the NSPA. In *Pierce*, the government contended that the defendants had unlawfully attempted to deprive the Canadian government of tax revenues by smuggling liquor across the border. The court of appeals reversed the conviction because the government had not proven the existence of any Canadian statute setting forth an obligation to pay import duties on liquor. *Id.* at 166, 168. That case does not establish even by negative implication that any foreign government's assertion of a legal obligation is to be given automatic effect in U.S. domestic law. The conduct alleged in that case—a scheme to deprive a government entity of tax revenues through evasion of import duties—would likely be unlawful in every country in the world, and certainly would be unlawful under U.S. law if the object of the scheme had been the U.S. government. The conduct for which petitioner was prosecuted in this case, however, would not have been unlawful had the property in question been discovered in the United States.

gress—as in the Lacey Act—that federal law should incorporate foreign law, no matter what its content, one should hesitate to conclude that Congress intended personal liberty to depend on such arcane matters. The government suggests that "there is no reason to suppose that the construction of national patrimony laws will pose unique interpretive difficulties." Br. in Opp. 14. But such laws do pose extraordinary interpretive difficulties for courts and for individuals who are involved in buying and selling art on a daily basis and who must, in the end, hazard a guess as to whether an art object might be covered by a "true" ownership law or only by a "mere" export regulation. Criminal liability turns on the difference—even when the law in question cannot with confidence be characterized as one or the other. *See* Pet. 18 & n.16 (discussing ambiguous laws of France, Guatemala, and New Zealand).[6]

The government's citation to *Mitchell* for the proposition that federal courts routinely interpret foreign laws (*see* Br. in Opp. 13 n.4) is hardly reassuring. That case involved a criminal prosecution under the Lacey Act that turned on the scope and validity of Pakistani laws regulating the hunting and export of wildlife. The *Mitchell* court struggled to resolve issues that would have presented a challenge even if they had arisen under American statutes—such as whether a "*bona fide* baggage" exception to export restrictions applied to all goods covered by the restrictions, or only to a

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[6] Such difficulties were in fact abundant both in this case, where conflicting testimony was presented to the district court about the character of Law 117 (*see* Pet. App. 10a-11a), and in *United States* v. *McClain*, 545 F.2d 988 (5th Cir. 1977), where the court of appeals was required to parse five Mexican statutes, with doubtful results (*see* Pet. 17 & n.15). In both cases, the defendants contended that they did not believe that the foreign state in question had asserted "true" ownership rights over cultural property. And although we dispute the government's characterization of the factual record in this case (*cf.* Pet. 3-6), the evidence, even as characterized by the government, is equally consistent with a conclusion that petitioner believed that Law 117 was merely an export restriction rather than a "true" ownership law.

subcategory, 985 F.2d at 1281, and whether a provincial hunting law infringed on the powers of the national government, *id.* at 1283. The court remarked on the "general unavailability of foreign legal materials," and was unable to arrive at a "definitive answer as to the official Pakistiani interpretation of the laws," especially since neither party had been able to produce "any cases bearing on the laws." *Id.* at 1280-1281. The court also noted that federal courts faced with the task of interpreting foreign law had relied on such sources as "a student note in a Philippine Law Review" and "a law clerk['s] . . . telephone conversation with the Hong Kong Trade Office." *Id.* at 1280. None of this lends much support to the government's breezy assertion that it should be a relatively simple matter for nonlawyers to discern whether or not a foreign country's cultural patrimony law is a "true" ownership law that covers particular items.

3. In our petition (at 15-16), we noted that while the heavily criticized case of *United States* v. *McClain*, 545 F.2d 988 (5th Cir. 1977), sent a shock through the art world when it was decided in 1977, that case had, for all practical purposes, become a historic footnote.[7] In its opposition, the government is unable to cite even one other NSPA prosecution in the 25 years since *McClain* that was based on the

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[7] The government cites *United States* v. *Holinshead*, 495 F.2d 1154 (9th Cir. 1974) (*see* Br. in Opp. 9), but that case, decided a few years before *McClain*, presented very different facts and as such did not engender similar controversy. *Holinshead* involved the theft of a monumental Guatemalan stela. "Guatemala's ownership of the stela was uncontested," Paul M. Bator, *An Essay on the International Trade in Art*, 34 Stan. L. Rev. 275, 346 n.125 (1982), and "the issue whether a governmental declaration of ownership was sufficient to sustain a conviction under the National Stolen Property Act does not appear to have been litigated," James R. McAlee, *From the Boston Raphael to Peruvian Pots: Limitations on the Importation of Art into the United States*, 85 Dick. L. Rev. 565, 579 n.60 (1981). Indeed, "the stela had actually been registered as a Guatemalan national monument." Bator, 34 Stan. L. Rev. at 346 n.125. Professor Bator described the *Holinshead* case as a "fluke" involving "remarkable coincidences"; as a result, the case "did not shake the general assumption[s]" surrounding the criminal liability of art importers. *Id.* at 346.

theory that property belonged to a foreign government because of the operation of a cultural patrimony law. The government faults us for failing to cite any decision "that has refused to apply the NSPA to property taken in violation of foreign law based on the perceived repugnance of that law to our own legal system" (Br. in Opp. 13-14), but of course, no court could have rejected *McClain*, for the government has never relied on that decision—until this case.[8] But now that the *McClain* theory has been adopted by the circuit with jurisdiction over the center of the art market in the United States (a point the government does not contest), it has suddenly been transformed from a dormant legal curiosity into the controlling law for all in this country who buy or sell cultural property of any kind.

As we explain below (pp. 7-9), there is a good explanation for *McClain*'s long eclipse; that decision cannot be reconciled with the later-enacted Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601 *et seq.*, which rejected

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[8] The government gamely cites *United States* v. *Long Cove Seafood, Inc.*, 582 F.2d 159 (2d Cir. 1978), as "citing *McClain* with approval" (Br. in Opp. 9), but in fact that decision rejected a prosecution theory very similar to the one put forward here. In *Long Cove*, the government argued that the defendants violated the NSPA by transporting clams that had been harvested in contravention of a New York law that asserted state ownership over shellfish. Turning aside the government's contention that the clams were "stolen" simply because New York claimed to own them, the court of appeals stated, "[e]ven under the broad definition in *Turley*, stealing is still essentially an offense against another person's proprietary or possessory interests in property.... [T]he question whether a particular item is 'stolen' cannot be decided in a vacuum, without considering whether there has been some sort of interference with a property interest." *Id.* at 163 (citations omitted). The court of appeals stressed that, under the common law, shellfish belong to the owner of the property where they are found, *id.* at 163-164, and that New York's asserted ownership was "no more than a 19th century legal fiction," *id.* at 165 (internal quotation marks and citation omitted). The court's supposed "approval" of *McClain* in *Long Cove* amounted to nothing more than the conclusion that the government's theory of prosecution in *Long Cove* would not have satisfied even the *McClain* court's extraordinarily expansive construction of the NSPA.

the premise that American law must accept a foreign government's broad assertion of ownership over artifacts in a cultural patrimony law. The government's *only* evidence for the vitality of *McClain* during the intervening years is 1985 testimony before a Senate subcommittee by a Justice Department official who opposed a bill that would have expressly overruled *McClain*. *See* Br. in Opp. 10. That very testimony, however, undermines the government's argument. That official told the Senate subcommittee that "this has not been a pressing problem. Since *McClain*, there have been no actual prosecutions under the act."[9] He further minimized the importance of *McClain* by testifying that, to the Department of Justice's understanding, only Mexico had a "true ownership" law that could support prosecution under the NSPA.[10] Especially in light of the Justice Department's depiction of *McClain* as a one-time oddity, one cannot read Congress's failure to overrule *McClain* as an endorsement of that decision, as the government suggests (*see* Br. in Opp. 11). "[S]everal equally tenable inferences may be drawn from such inaction." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks and citation omitted). Congress may have relied on the Department's representation that *McClain* did not present a "pressing problem" and concluded that no remedial legislation was needed.

4. Under the court of appeals' decision, the NSPA in effect bars the importation into the United States of any cultural object over which a foreign state has asserted ownership in a cultural patrimony law. Any such object would be deemed "stolen" under the NSPA when it was removed from its country of origin without the government's permission, and its importation here would be illegal. But if that is

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[9] *Relating to Stolen Archaeological Property: Hearing on S. 605 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 29 (1985) (testimony of James Knapp).

[10] *Id.* at 35. He further noted that ascertaining the meaning of the Mexican laws in *McClain* had been "extremely difficult." *Id.* at 64.

so, then it is impossible to understand what Congress and the Executive Branch were attempting to accomplish in either the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Nov. 14, 1970), 823 U.N.T.S. 231 (1972), or the CPIA, which implements the Convention. As we have explained (Pet. 20-25), in both measures the United States government *rejected* the proposition that the U.S. should bar the importation here of all property covered by foreign cultural patrimony laws. That rejection was based on the congressional judgment that neither preservation of culturally sensitive property nor understanding of other cultures is best served by a ban on the international circulation of cultural objects merely because another country claims to own them as part of its cultural patrimony.

The government observes that "the CPIA does not specifically refer to [national patrimony] laws." Br. in Opp. 16. But that is precisely our point; both the Convention and the CPIA *rejected* the proposition that any country's import regulations must defer to any other country's cultural patrimony law. The government fails even to acknowledge the drafting background to the Convention, which the United States initially declined to accept precisely because the original draft adopted a "blank check" approach requiring signatories to accept each others' assertions of state ownership over cultural property. *See* Pet. 21-22. The Convention was eventually framed to allow the United States to *permit* the importation of cultural objects claimed by other countries.

Congress did exactly that in the CPIA, in which it adopted the principle that "U.S. actions in these complex matters should not be bound by the characterization of other countries." S. Rep. No. 97-564, at 27 (1982). The CPIA establishes a highly focused regime that (a) bars the importation only of property stolen from certain institutions and cultural property subject to emergency measures, and (b) otherwise allows the importation of many cultural objects to which another country claims ownership—including the

Egyptian antiquities at issue in this case. *See* Pet. 23-24. Yet the court of appeals held that the NSPA *criminally punishes* the same act. Thus, there is a dramatic inconsistency between the CPIA and the NSPA, as the latter was construed by the court of appeals. But under our submission, the two acts are entirely consistent.

5. The court of appeals' construction of the NSPA would raise serious concerns even if it involved lumber or iron ore, but the decision's effect on the international art trade only heightens the need for this Court's review. If allowed to stand, this decision, coming as it does from the jurisdiction where the nation's art capital is located, will effectively be the law of the land affecting all who buy, sell, or merely enjoy looking at works of art. And the decision is bad as both law and policy, for it will surely chill the circulation of art. In the future, both buyers and sellers will understandably be uncertain whether cultural objects—even if long believed to be legitimately held in private hands and even if supported by provenances tracing the chain of title for decades—might someday be subject to a claim of ownership under a foreign cultural patrimony law of which the parties had no awareness.

The government expresses skepticism about such a chill, noting that even now, purchasers of antiquities undertake some risk that the items might later be shown to have been stolen. *See* Br. in Opp. 11. Of course, anyone who purchases anything—be it art works or apples—bears some risk that the purchased item might be stolen, but the court of appeals' decision greatly magnifies the uncertainty. When a collector or a museum purchases a work of art, the buyer can insist on a provenance and, if the provenance is sufficiently lengthy and detailed, can conclude that it is unlikely that someone else will lay claim to the object. But under the court of appeals' decision, even if the object has been in private hands for decades, and even if each transfer over those decades is well documented, the buyer must now consider whether a foreign government might eventually produce an obscure regulation under which it asserts ownership—just as Mexico did in *McClain*, where it claimed that the objects

were covered by an 1897 cultural patrimony law (*see* Pet. 17 n.15). It is hardly reassuring to such a purchaser to hear that a federal court might eventually conclude that the law was a "mere" export restriction rather than a "true" ownership law (as happened in *McClain*, where the court of appeals rejected the Mexican government's reading of the 1897 law). The mere prospect that our government might prosecute someone for possessing an object arguably covered by a cultural patrimony law would frighten any reasonable person away from buying such an object.

That overdeterrence would come at a great cost. Art is one of the great treasures of humanity. Our ability to see the art of other lands and times expands our horizons by increasing our awareness of other ways of living and thinking. A decision like that of the court of appeals, which deters and punishes the circulation of art, should not be taken lightly. This Court's review is warranted so that the court of appeals' gravely mistaken decision does not become the law of the land.

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For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2003